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No. 10-1051

Supreme Court, U.S.
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Supreme Court of the United States

CHIPOTLE MEXICAN GRILL, INC.,
Petitioner,

v.

MAURIZIO ANTONINETTI,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Maurizio Antoninetti filed this suit alleging that petitioner Chipotle Mexican Grill, Inc., violated Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181-12189, because wheelchair-bound customers could not see the "food preparation counter" where their orders were prepared. Noting Antoninetti's lengthy history of suing businesses for purported accessibility violations, extracting cash settlements, and never returning, the district court denied an injunction, finding that Antoninetti's "purported desire to return to the Restaurants is neither concrete nor sincere or supported by the facts." The Ninth Circuit reversed, holding that denial of injunctive relief would be an abuse of discretion because Title III specifically provides for such relief and because the parties had stipulated before trial that Antoninetti "wants to be able to have the 'Chipotle experience.'" The questions presented are:

1. Whether a statute's express provision for injunctive relief reduces or eliminates a plaintiff's burden of meeting the traditional criteria for injunctive relief.

2. Whether the Ninth Circuit's holdings that courts may not give meaningful weight to a plaintiff's history of serial litigation, and that a plaintiff's abstract desire "to be able to have" an experience makes the denial of injunctive relief an abuse of discretion, conflict with this Court's holding in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), that mere "'some day' intentions" to return to a location, "without any description of concrete plans," cannot establish the imminent injury necessary to obtain injunctive relief.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner Chipotle Mexican Grill, Inc., states that it has no parent corporation; that T. Rowe Price Associates, Inc., a wholly-owned subsidiary of T. Rowe Price Group, Inc., and Fidelity Management & Research Company, a wholly-owned subsidiary of FMR LLC, are each beneficial owners of more than 10% of Chipotle Mexican Grill, Inc.'s stock; and that no other publicly held company owns 10% or more of Chipotle Mexican Grill, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Chipotle Mexican Grill, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-20a) is reported at 614 F.3d 971. The district court's opinion (App., *infra*, 40a-92a) is unreported but available at 2008 WL 111052.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on July 26, 2010. App., *infra*, 21a-39a. It denied rehearing on September 22, 2010, *id.* at 93a-94a, and issued an amended opinion that same day, *id.* at 1a-20a. On December 14, 2010, Justice Kennedy extended the time to file a petition for a writ of certiorari to January 20, 2011. No. 10A593. On January 18, Justice Kennedy further extended that

time to February 18, 2011. *Ibid.* This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant portions of Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181-12189, Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(a), and the ADA Accessibility Guidelines, 28 C.F.R. pt. 36, app. A, § 7.2(2), are set forth in the Appendix. App., *infra*, 95a-101a.

INTRODUCTION

This case concerns an issue that has divided the courts of appeals: the showing a plaintiff must make to obtain injunctive relief under Title III of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12181-12189. Title III prescribes requirements to help ensure that public accommodations are accessible to the disabled. Respondent Maurizio Antoninetti filed this suit alleging that petitioner Chipotle Mexican Grill, Inc., violated those requirements because wheelchair-bound customers could not see the "food preparation counter" where their orders were prepared. The district court denied an injunction. Noting Antoninetti's long history of suing businesses for purported accessibility violations, settling for cash payments, and never returning, the court found that Antoninetti's "purported desire to return to the Restaurants is neither concrete nor sincere or supported by the facts." App., *infra*, 87a.

The Ninth Circuit reversed. It held that, because the ADA expressly provides for injunctive relief, plaintiffs need not meet the traditional standard for obtaining an injunction and need make only a reduced showing. Applying that modified standard, the Ninth Circuit held that the district court was not permitted to give any sig-

nificant weight to Antoninetti's history as a serial plaintiff and instead had to give dispositive weight to a pretrial stipulation that "Antoninetti wants to be able to have the 'Chipotle experience.'" App., *infra*, 15a.

That decision conflicts with decisions of other circuits holding that traditional equitable standards govern even where Congress expressly authorizes injunctive relief. Moreover, the holding that courts may not give any significant weight to a plaintiff's litigation history and instead must defer to a non-specific desire "to be able to have the 'Chipotle experience'" conflicts with this Court's holding in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), that mere "'some day' intentions" to return to a location, "without any description of concrete plans," cannot establish the imminent injury necessary for injunctive relief. *Id.* at 564. This Court's review is warranted.

STATEMENT

I. Statutory And Regulatory Framework

A. Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). To meet that requirement, public accommodations built for first occupancy after January 26, 1993, must be "readily accessible to and usable by individuals with disabilities," as defined by the Attorney General's ADA Accessibility Guidelines. *Id.* §§ 12183(a)(1), 12186(b); 28 C.F.R. pt. 36, app. A.

Section 7.2(2) of the Guidelines governs "counters * * * at which goods or services are sold or distributed." 28 C.F.R. pt. 36, app. A § 7.2(2). To meet that guideline, a "portion of the main counter" at least 36 inches long must be no more than 36 inches high, *id.* § 7.2(2)(i), or there

must be a nearby "auxiliary counter" that is no more than 36 inches high, *id.* §7.2(2)(ii). Alternatively, a business may provide "equivalent facilitation," *id.* §7.2(2)(iii), defined as "[d]epartures from particular technical and scoping requirements * * * by the use of other designs and technologies" that "provide substantially equivalent or greater access to and usability of the facility," *id.* §2.2. Section 7.2(2) offers as examples a hotel registration counter's use of "a folding shelf * * * on which an individual with disabilities can write" and "use of the space on the side of the counter * * * for handing materials back and forth." *Id.* §7.2(2)(iii).

B. Title III sets forth extensive provisions for enforcement. Any person discriminated against, or about to be discriminated against, on the basis of disability may sue. 42 U.S.C. §12188(a)(1). The "remedies and procedures" in private suits are those set forth in Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a-3(a). See *id.* §12188(a)(1). That provision authorizes "preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order," but not damages. *Id.* §2000a-3(a). No provision of Title III requires a district court to issue an injunction upon finding a violation. When a court does order injunctive relief, however, the injunction "shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter." *Id.* §12188(a)(2).

Title III also authorizes the Attorney General to sue if there is "reasonable cause to believe" that "any person or group of persons is engaged in a pattern or practice of discrimination" or that "any person or group of persons has been discriminated against * * * and such discrimination raises an issue of general public importance." 42

U.S.C. § 12188(b)(1)(B). As in private actions, a court can grant equitable relief. *Id.* § 12188(b)(2)(A). But a court may also order "monetary damages to persons aggrieved when requested by the Attorney General," *id.* § 12188(b)(2)(B), as well as civil penalties of up to $50,000, or $100,000 for repeat violations, *id.* § 12188(b)(2)(C).

II. Proceedings Below

A. Background

Petitioner Chipotle Mexican Grill, Inc., operates restaurants featuring quick-service, custom-prepared Mexican food as part of a distinctive "Chipotle experience." App., *infra*, 43a. "The Chipotle experience consists of the architecture, décor, and music of the restaurants, the aroma of the food, the appearance of a customer's entrée, Chipotle's friendly staff, its tradition of excellent customer service, the ability to customize one's entrée, and above all, the taste of the food." *Ibid.* One part of that experience is customers' "ability to see the freshness of the quality ingredients available," although that aspect "has always been of secondary importance to the appearance and taste of the food once it has been prepared and served to the customer." *Ibid.*

The two Chipotle restaurants at issue here were built after January 26, 1993. App., *infra*, 7a. At each restaurant, Chipotle employees prepare entrées at a "food preparation counter" containing ingredients such as salsa, guacamole, cheese, and lettuce. *Id.* at 3a. The available ingredients are also listed on menus and on large boards above the counter. *Id.* at 3a-4a. The food preparation counter used by employees is 34 to 35 inches high, but it is separated from customers by a wall that, at the time of this litigation, was approximately 45 inches high. *Id.* at 3a. As customers move through a line in front of the food preparation counter, they can look over the wall

to see ingredients and tell employees what they want. *Ibid.* The customers can then watch as their orders are prepared. *Id.* at 4a. At the end of the food preparation counter is a "transaction station" where customers receive and pay for the food. *Ibid.* That 34-inch-high, four-foot-long counter contains the cash register as well as two to three feet of empty space. *Ibid.*

The average eye level of persons in wheelchairs is 43 to 51 inches above the floor. App., *infra*, 5a. Within that range, at a distance of 12 inches, a person cannot see over the 45-inch separator wall to the food preparation counter. *Ibid.* Before this litigation, Chipotle had an unwritten policy of accommodating customers in wheelchairs who wanted to see the ingredients or watch their food being prepared. *Ibid.* If a customer asked to see ingredients, employees would show samples using serving spoons, tongs, or cups. *Ibid.* Employees would also assemble orders at the transaction station or at the customer's table upon request. *Ibid.*

In response to this litigation, Chipotle adopted a written "Customers With Disabilities Policy." App., *infra*, 5a. That policy expressly lists accommodations:

> 1. Samples of the food can be placed in soufflé cups and shown or handed to the customer.
>
> 2. Some customers may prefer an opportunity to see or even sample the food at a table.
>
> 3. Customers may simply wish to have the food or food preparation process described to them.
>
> 4. Or combinations of the above accommodations with any other reasonable accommodation requested or appropriate for the individual.

Id. at 6a. The written policy requires the manager on duty, not just other crew members, to greet customers

with disabilities and inquire whether they want accommodations. *Id.* at 70a. It also emphasizes that the manager "must affirmatively inform the customer with a disability of the various accommodations options without waiting for the customer to request them." *Ibid.*

B. Proceedings Before the District Court

1. On August 22, 2005, respondent Maurizio Antoninetti, who uses a wheelchair, filed this suit alleging that Chipotle violated Title III of the ADA. App., *infra*, 40a-41a, 44a. Antoninetti has a lengthy history of ADA litigation. Since 1991, he "has been involved in over 100 accessibility lawsuits, as either a plaintiff or a paid plaintiff-side accessibility consultant/expert witness." *Id.* at 44a. He has personally "sued over twenty business entities for alleged violations, and, in all (but one) of those cases, he never returned to the establishment he sued after settling the case and obtaining a cash payment." *Id.* at 88a; see *id.* at 45a-47a (describing lawsuits). To give one example, Antoninetti "filed lawsuits against at least eighteen different businesses based on a one-day visit to a shopping mall" where he had never shopped before. *Id.* at 89a. He visited at the behest of a law firm he hoped "would retain him as a paid accessibility consultant/expert witness in any accessibility lawsuit(s) that it would file against the mall stores." *Ibid.* After that one-time visit, Antoninetti became a plaintiff in suits against at least 18 mall businesses, obtained a cash settlement in each suit, and never returned to the mall again. *Ibid.*

Antoninetti filed this suit following a single visit to two Chipotle restaurants in Encinitas and San Diego, California. App., *infra*, 87a-88a. He returned to the Encinitas restaurant only once after filing suit, to inspect the site for this litigation. *Id.* at 73a. He returned to the San Diego restaurant three times as a customer and twice for

litigation purposes. *Id.* at 3a, 87a-88a. During Antoninetti's inspection visits, Chipotle employees showed him samples of ingredients. *Id.* at 75a-77a. He admitted the samples were helpful and indicated he was "satisfied with the service he had received." *Ibid.* He further admitted that, during every visit, "he enjoyed the entrée he received and found nothing wrong with his order." *Id.* at 73a. At no time before filing suit did he "ma[k]e any effort to contact Chipotle's management to complain about his experiences at the Restaurants." *Id.* at 77a.

Nonetheless, Antoninetti's complaint asserted that Chipotle's restaurants violated the ADA because the separator wall "obstruct[ed] his view of the [food] preparation counters and thereby denie[d] him the right to see the food ingredients and customize his food order." App., *infra*, 41a. He sought an injunction "requiring Chipotle to lower the Wall at the Restaurants to a maximum height of 36 inches." *Id.* at 86a.

2. On cross-motions for summary judgment, the district court held that the 36-inch height limit of Accessibility Guideline § 7.2(2) applied to the separator wall in front of the food preparation counter. App., *infra*, 41a. Although the transaction station was less than 36 inches high, the court held that it did not qualify as either a "portion of the main counter" or an "auxiliary counter" under subsections (i) or (ii). *Ibid.* The court reserved judgment, however, on whether Chipotle's policy of accommodating disabled customers qualified as an "equivalent facilitation" under subsection (iii). *Ibid.*

Following a four-day bench trial, the district court held that Chipotle's prior unwritten policy did not qualify as an "equivalent facilitation," primarily because it was vulnerable to subjective enforcement, but that Chipotle's later, written policy did qualify. App., *infra*, 42a, 81a-85a.

The court highlighted the new requirements that managers, not just crew members, ask whether disabled customers want accommodations, and that they affirmatively inform the customers of the accommodations available. *Id.* at 82a-83a.

The court then turned to Antoninetti's request for an injunction. It acknowledged that Title III authorizes only injunctive relief in private suits but concluded that such relief was nevertheless an "equitable remedy" that was "not available as a matter of course." App., *infra*, 85a. Instead, a plaintiff must prove "(1) an irreparable injury; (2) inadequacy of legal remedies; (3) a balance of hardships favoring the plaintiff; and (4) advancement of the public interest." *Id.* at 85a-86a.

The court held that Antoninetti had failed to show he would suffer irreparable injury absent an injunction. Antoninetti's "purported desire to return to the Restaurants," the court found, "is neither concrete nor sincere or supported by the facts." App., *infra*, 87a. Antoninetti had visited each restaurant only once before suing. *Id.* at 87a-88a. And he had not returned to either since his litigation-related inspections more than a year earlier, even though one was near his home. *Id.* at 87a.

The court found additional support from Antoninetti's "history as a plaintiff in accessibility litigation." App., *infra*, 88a. In every one of his more than 20 prior suits, Antoninetti had settled for a cash payment. *Id.* at 88a-89a. And "in all (but one) of those cases, he never returned to the establishment he sued after settling." *Id.* at 88a. Those facts, too, showed that Antoninetti did not intend to return and thus could not show irreparable injury. *Id.* at 88a-90a.

Turning to the public interest, the court noted "uncontroverted evidence" that Chipotle had "served customers

in wheelchairs at the Restaurants both before and after the written Customers With Disabilities Policy was implemented." App., *infra*, 90a. Yet it had "never received any complaint from a customer in [a] wheelchair regarding the accessibility of the food serving lines." *Ibid.*

Finally, the court found that Antoninetti had not shown that an injunction was "'justified by the relief it will provide.'" App., *infra*, 90a. Antoninetti had offered "no evidence" of either the reasons the separator wall was designed as it was or "the cost or feasibility of enjoining Chipotle to lower the Wall." *Ibid.* Accordingly, the court denied injunctive relief. *Id.* at 91a.[1]

C. The Ninth Circuit's Decision

The Ninth Circuit reversed in relevant part. App., *infra*, 21a-39a.

1. Addressing the ADA's substantive requirements, the Ninth Circuit held that Antoninetti had established a violation of the Act. The court first ruled that the dispute was governed by Section 7.2(2)'s 36-inch counter-height limit. App., *infra*, 27a-29a. Agreeing with the district court, the Ninth Circuit further held that the unobstructed, 34-inch-high transaction station where customers received their food did not satisfy Chipotle's obligations under that provision. *Id.* at 29a-30a. The 45-inch-high separator wall, the court explained, "conceals the food preparation counter from wheelchair-bound customers and thus prevents those customers from having the experience of non-disabled customers of fully participating

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[1] The district court awarded Antoninetti $5,000 under the California Disabled Persons Act, which allows such awards whenever an ADA violation is found. App., *infra*, 91a. It also ordered a partial award of attorney's fees in light of Antoninetti's "limited success." *Id.* at 17a.

in the selection and preparation of their order at the food preparation counter." *Id.* at 30a.

Disagreeing with the district court in part, the Ninth Circuit held that neither Chipotle's prior unwritten policy nor its later written policy was an "equivalent facilitation." App., *infra*, 30a-32a. The policies' accommodations, it held, could not constitute equivalent facilitation because "they do not involve 'use of other designs and technologies' or 'provide * * * substantially equivalent or greater access to and usability of the facility.'" *Id.* at 32a. Rather, they "merely provide a substitute experience that lacks the customer's personal participation in the selection and preparation of the food that the full 'Chipotle experience' furnishes." *Ibid.*

2. The Ninth Circuit also reversed the denial of injunctive relief. App., *infra*, 32a-35a. Although the district court had expressly found that Antoninetti's "'purported desire to return to the [r]estaurants is neither concrete nor sincere or supported by the facts,'" the Ninth Circuit held that the district court had erred by relying on Antoninetti's litigation history in making that finding. *Id.* at 34a. "Courts must tread carefully before construing a Disability Act plaintiff's history of litigation against him," the Ninth Circuit opined, because "'it may indeed be necessary and desirable for committed individuals to bring serial litigation.'" *Ibid.* Accordingly, courts must be "'particularly cautious' regarding 'credibility determinations that rely on a plaintiff's past [Disabilities Act] litigation.'" *Ibid.*

The Ninth Circuit did not address the district court's other findings that an injunction was neither in the public interest nor justified in light of its costs. App., *infra*, 90a. Nonetheless, the court held that denying an injunction on remand would be an abuse of discretion. The case, the

court noted, was now in a different posture because the court had ruled that Chipotle's new policy did not qualify as an equivalent facilitation. *Id.* at 34a. And the court deemed it significant that "[i]njunctive relief is the sole remedy available to private parties under the Disabilities Act." *Id.* at 33a. District courts, the Ninth Circuit ruled, *must* give weight to that feature of the statute in deciding whether to grant an injunction: "Considering all the circumstances," the court of appeals held, "including particularly the statutory violations we have found *and the fact that an injunction is the only relief available to a private party under the Act*, it would be an abuse of discretion for the district court now to deny injunctive relief." *Id.* at 34a-35a (emphasis added). The Ninth Circuit thus "reverse[d] the district court's denial of [injunctive] relief and remand[ed] the case with instructions to that court to enter an appropriate injunction." *Id.* at 35a.

The court of appeals purported to express no view as to whether Title III ever "authorizes a district court to deny injunctive relief after finding a violation of the Act." App., *infra*, 35a. But the court noted that it had previously concluded that "'[t]he standard requirements for equitable relief *need not be satisfied* when an injunction is sought to prevent the violation of a federal statute which *specifically provides for injunctive relief*.'" *Ibid.* (quoting *Silver Sage Partners, Ltd.* v. *City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001) (in turn quoting *Burlington N. R.R. Co.* v. *Dep't of Revenue*, 934 F.2d 1064, 1074 (9th Cir. 1991))) (emphasis added).[2]

3. Chipotle sought rehearing and rehearing *en banc*. Requiring injunctive relief despite the district court's ex-

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[2] In light of its disposition, the Ninth Circuit remanded for further proceedings on the amount of the attorney's fee award and Antoninetti's state-law claim. App., *infra*, 35a-39a.

press finding that Antoninetti lacked a sincere intent to return, Chipotle urged, conflicted with decisions of other circuits. C.A. Pet. for Reh'g 4-11. The error, moreover, was of constitutional magnitude because Article III requires a plaintiff to show an injury that is both "'concrete [and] particularized'" and "'actual or imminent'" before obtaining an injunction. *Id.* at 2, 7-9 & n.2 (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

The court of appeals denied rehearing but amended its opinion in one respect. At the end of the passage cautioning courts not to give significant weight to a plaintiff's litigation history, the court inserted language adverting to a pretrial stipulation that "Antoninetti wants to be able to have the 'Chipotle experience.'" App., *infra*, 2a, 15a. The court stated:

> Such caution is especially appropriate in this case where, as previously noted, Chipotle stipulated that "Antoninetti wants to be able to have the 'Chipotle experience.'" Accordingly, there can be no doubt that Antoninetti wanted to return to the Chipotle restaurants to enjoy the same experience that other non-disabled Chipotle customers could have. The district court's finding thus is inconsistent with and totally undermined by the parties' stipulation.

Ibid.

4. On remand, Chipotle informed the (newly assigned) district judge that it had lowered the separator walls at its restaurants, and argued that this eliminated the need for any injunction. See Dist. Ct. Dkt. #329, at 2 (Nov. 29, 2010). The district court, however, rejected that effort at voluntary compliance. After noting Antoninetti's argument that "an injunction is still necessary to ensure that these modifications are made permanent," the court stated that, "to properly follow the Ninth Cir-

cuit opinion, an appropriate measure must be in place to ensure that Chipotle's food preparation counters remain permanently in compliance with this law." *Ibid.* The court set a briefing and discovery schedule to address what form that measure would take. *Ibid.*

5. On December 14, 2010, Justice Kennedy extended the time within which to file this petition to January 20, 2011. No. 10A593. On January 18, Justice Kennedy further extended that time to February 18, 2011. *Ibid.*

REASONS FOR GRANTING THE PETITION

An injunction is an "extraordinary remedy never awarded as of right." *Winter* v. *Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 376, 381-382 (2008). A plaintiff ordinarily must establish not only a violation of his legal rights but also that the traditional equitable criteria favor relief: that the plaintiff faces a threat of irreparable harm; that the balance of equities favors an injunction; and that an injunction is in the public interest. See *id.* at 374, 381-382; *eBay Inc.* v. *MercExchange, LLC*, 547 U.S. 388, 391 (2006).

In this case, the Ninth Circuit held that a plaintiff suing under Title III of the ADA need *not* make that traditional showing. Instead, the court held that, because the ADA expressly provides for injunctive relief, a plaintiff need only make a reduced showing—or perhaps no showing at all—so long as a violation is established. "[T]he fact that an injunction is the only relief available to a private party under the Act," the court held, reduces the burden a plaintiff must meet. App., *infra*, 15a. Applying that watered-down standard, the Ninth Circuit held that a district court may not give any meaningful weight to a plaintiff's history of serial litigation—dismissing Antoninetti's lengthy pattern of failing to return to the businesses he had sued—and must instead give dispositive

weight to generalized statements such as the stipulation that "Antoninetti wants to be able to have the 'Chipotle experience.'" *Id.* at 14a-15a.

That decision warrants review. The circuits are divided—both under the ADA and more generally—over whether an express statutory provision for injunctive relief eliminates or modifies the traditional standards for injunctions. Some, like the Ninth Circuit, hold that such provisions reduce or eliminate the burden a plaintiff must meet. Others hold that such provisions have no effect on the traditional standards.

The Ninth Circuit's decision also conflicts with *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992). *Lujan* held that, when a plaintiff's standing to seek an injunction depends on his intent to return to a location, he must show "concrete plans" to return, not merely "'some day' intentions." *Id.* at 564. A plaintiff's status as a serial litigant who has sued dozens of businesses for cash settlements and never returned is plainly relevant to the sincerity of his purported intent to return. And a nebulous desire "to be able to have the 'Chipotle experience'" at some unknown date, if it even qualifies as a "plan" at all, is plainly not a *concrete* one. The Ninth Circuit's contrary holdings—that courts are *prohibited* from giving meaningful weight to a plaintiff's serial litigation, and that a plaintiff's abstract desire "to be able to have" an experience makes the denial of injunctive relief an *abuse of discretion*—highlight how far that court has departed from constitutional standing requirements—and, *a fortiori*, from the traditional requirements for equitable relief.

Those issues have tremendous practical significance. Title III of the ADA has sweeping breadth and affects virtually every aspect of daily public life. Moreover, there is now a cottage industry of accessibility litigation

in which serial plaintiffs attempt to extract cash settlements from hundreds or even thousands of businesses. The Ninth Circuit's decision aggravates that trend, distorting not only the bounds of traditional equitable jurisdiction but also the fundamental standing requirements of Article III.

I. The Court Should Resolve Whether A Statute's Express Provision For Injunctive Relief Reduces Or Eliminates The Equitable Showing A Plaintiff Must Make

The Ninth Circuit held that Title III of the ADA, by expressly providing for injunctive relief, reduces or eliminates the burden a plaintiff must meet to obtain an injunction. App., *infra*, 15a-16a. That erroneous holding does not merely conflict with other decisions construing Title III. It also implicates a longstanding circuit conflict over the significance of such provisions generally.

A. The Circuits Are Squarely Divided

The courts of appeals have long been divided over whether an express authorization of injunctive relief reduces or eliminates a plaintiff's burden to meet the traditional criteria for such relief—a threat of irreparable harm, a balance of equities favoring an injunction, and a showing that the public interest likewise favors relief.

1. Many courts hold that Congress's express provision for equitable relief does not alter a plaintiff's traditional burden. Addressing the issue under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), for example, the Seventh Circuit rejected the claim that, "'where the plaintiff seeks an injunction to prevent the violation of a federal statute that specifically provides for injunctive relief, it need not show irreparable harm.'" *Bedrossian* v. *Nw. Mem'l Hosp.*, 409 F.3d 840, 843 n.1 (7th Cir. 2005). To the contrary, the

court explained, "traditional equitable considerations (including irreparable harm)" govern unless Congress has "clearly mandate[d] injunctive relief." *Id.* at 843. Although the USERRA provides for injunctions, that authorization is "phrased in permissive rather than mandatory terms" and thus does not justify departure from the traditional standard. *Ibid.* The USERRA, the Seventh Circuit further observed, is analogous to other antidiscrimination statutes that the court had previously construed not to diminish a plaintiff's burden, including Title II of the ADA. *Id.* at 844.

The Third Circuit has likewise held that a "district court abuse[s] its discretion" by "not explicitly applying the traditional equitable standard in determining whether an injunction [i]s appropriate" under the Clean Water Act, notwithstanding that statute's express provision for injunctive relief. *Natural Res. Def. Council, Inc.* v. *Texaco Ref. & Mktg., Inc.*, 906 F.2d 934, 935, 937 (3d Cir. 1990). "[A]bsent a clear Congressional statement," it held, "courts should not infer that Congress intended to alter equity practices." *Id.* at 940 n.6. Similar holdings by other courts abound. See, *e.g.*, *Sharp* v. *Parents in Cmty. Action, Inc.*, 172 F.3d 1034, 1038 (8th Cir. 1999) ("When a federal statute authorizes injunctive relief, the presumption is that Congress intends the courts to exercise their traditional equitable discretion."); *Muffley ex rel. NLRB* v. *Spartan Mining Co.*, 570 F.3d 534, 542 (4th Cir. 2009) ("traditional four-part test" applies); *United States* v. *Marine Shale Processors*, 81 F.3d 1329, 1359-1360 (5th Cir. 1996) (courts retain "traditional * * * discretion"); *Town of Huntington* v. *Marsh*, 859 F.2d 1134, 1143 (2d Cir. 1988) ("injunctive relief does not follow automatically upon a finding of statutory violations" but depends on "traditional equitable principles").

Consistent with those authorities, courts have held that traditional equitable standards govern suits under Title III of the ADA as well. In *Bercovitch* v. *Baldwin School, Inc.*, 133 F.3d 141 (1st Cir. 1998), the First Circuit addressed whether a district court had abused its discretion by enjoining a school to readmit a student. "A trial court's decision to issue a preliminary injunction in an ADA case, as in all cases," the First Circuit ruled, must be governed by the four traditional equitable factors—likelihood of success on the merits, irreparable harm, balancing of hardships, and the public interest. *Id.* at 151. The court vacated the injunction because the plaintiffs could not meet that standard. *Id.* at 151-156.

The Third Circuit took the same view in *Doe* v. *National Board of Medical Examiners*, 199 F.3d 146 (3d Cir. 1999). There, the court vacated an injunction forbidding an examining board from noting that a student had received extra time on his test to accommodate his disability. The court set forth the traditional "'[f]our factors [that] govern a district court's decision whether to issue a preliminary injunction'" and concluded they were not met. *Id.* at 154-158.[3]

2. Other circuits have taken the contrary view. In *Atchison, Topeka & Santa Fe Railway Co.* v. *Lennen*, 640 F.2d 255 (10th Cir. 1981), the Tenth Circuit held that "'[w]here an injunction is authorized by statute it is unnecessary for plaintiff to plead and prove the existence of

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[3] *Bercovitch* and *Doe* involved preliminary rather than permanent injunctions, but the difference is immaterial. "The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 546 n.12 (1987); see also *Winter*, 129 S. Ct. at 381-382.

the usual equitable grounds, irreparable injury and absence of an adequate remedy at law.'" *Id.* at 260. Because the statute before it (the Railroad Revitalization and Regulatory Reform Act of 1976) expressly authorized injunctive relief, the Tenth Circuit ruled that the district court had abused its discretion by "applying traditional equitable criteria to determine whether to grant or deny an injunction." *Id.* at 260-261.

The Sixth Circuit followed suit in *CSX Transportation, Inc.* v. *Tennessee State Board of Equalization*, 964 F.2d 548 (6th Cir. 1992). Courts, it observed, normally consider "traditional equitable principles for granting a preliminary injunction." *Id.* at 550-551. The statute before it, however, "expressly authorized the granting of injunctive relief to halt or prevent a violation." *Id.* at 551. Given that authorization, the Sixth Circuit held, a district court must *not* consider "traditional equitable criteria" but instead "determine only whether there is 'reasonable cause' to believe that a violation of [the statute] has occurred or is about to occur." *Ibid.* (citing *Lennen*, 640 F.2d at 261). Other courts have reached similar results, modifying or eliminating the plaintiff's burden where a statute expressly provides for injunctive relief. See, *e.g.*, *Gresham* v. *Windrush Partners, Ltd.*, 730 F.2d 1417, 1423-1424 (11th Cir. 1984) ("irreparable injury may be presumed" from violation of a statute that authorizes injunctive relief (citing *Lennen*)).

3. The Ninth Circuit's decisions place it squarely in the latter side of that divide. In *Trailer Train Co.* v. *State Board of Equalization*, 697 F.2d 860 (9th Cir. 1983), the court cited *Lennen* for the point that "'[t]he standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides for

injunctive relief.'" *Id.* at 869. The Ninth Circuit reaffirmed that holding in *Burlington Northern Railroad Co.* v. *Department of Revenue*, 934 F.2d 1064, 1074-1075 (9th Cir. 1991), and *Silver Sage Partners, Ltd.* v. *City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001).

This case is the latest manifestation of the Ninth Circuit's refusal to apply traditional equitable criteria where a statute expressly authorizes injunctive relief. The court cited *Silver Sage* and *Burlington Northern* for the point that "'[t]he standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief.'" App., *infra*, 16a. The court disclaimed any intent to address whether the ADA *ever* "authorizes a district court to deny injunctive relief after finding a violation." *Id.* at 15a. But in substance the Ninth Circuit answered that question too. The sum total of its analysis as to why denial of injunctive relief here would be an abuse of discretion was:

> Considering all the circumstances, including particularly the statutory violations we have found and the fact that an injunction is the only relief available to a private party under the Act, it would be an abuse of discretion for the district court now to deny injunctive relief.

Ibid. The court thus deemed injunctive relief mandatory because (1) the statute had been violated; (2) the ADA provides for injunctions; and (3) there were other "circumstances." What those other "circumstances" were was never specified.[4] Thus, while the Ninth Circuit pur-

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[4] The only other "circumstance" addressed in the Ninth Circuit's original opinion surely could not help: Citing Antoninetti's history of visiting a business once, suing for a cash settlement, and never returning, the district court had concluded that Antoninetti's "pur-

ported not to hold that violation of a statute authorizing injunctive relief *mandates* such relief, the court's failure to identify any meaningful circumstance beyond the violation here speaks volumes.

In any event, the Ninth Circuit at least *modified* the traditional standard. The court expressly held that "the fact that an injunction is the only relief available to a private party under the Act" weighs heavily (here, dispositively) in favor of an injunction—or, to put it differently, that the Act's provision for injunctive relief reduces the burden a plaintiff must meet. App., *infra*, 15a. Even on that view, the Ninth Circuit's decision conflicts with the many decisions of other circuits holding that a statutory provision authorizing injunctive relief does not affect a court's traditional equitable discretion. See pp. 16-17, *supra*. It also conflicts with decisions of at least two circuits applying the unmodified standard in the Title III context. See p. 18, *supra*.

This case thus directly implicates a persistent and widespread division of authority. The courts of appeals are well aware of the conflict. In *United States* v. *Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998), the D.C. Circuit noted that "[s]ome cases * * * took the view that mere statutory authorization of injunctive relief displaced

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ported desire to return to the Restaurants is neither concrete nor sincere or supported by the facts." App., *infra*, 87a-89a. The Ninth Circuit faulted the district court for relying on that history, *id.* at 34a, but that circumstance obviously cannot weigh *in favor* of an injunction. The Ninth Circuit, moreover, did not even address the district court's findings that an injunction was neither in the public interest nor justified in light of its costs. *Id.* at 90a. And the only additional "circumstance" addressed belatedly on rehearing—the stipulation that "Antoninetti wants to be able to have the 'Chipotle experience,'" *id.* at 15a—is so devoid of content that it amounts to no circumstance at all. See pp. 28-30, *infra*.

equitable standards." *Id.* at 944 (citing *Lennen*). But the court criticized that line of authority, instead concluding that the sounder rule was that statutory authorization did not "displace[ ] * * * the usual equitable standards." *Ibid.* The Ninth Circuit took the opposite view below. Despite many years of grappling with this issue, the circuits continue to disagree. This Court should grant the petition and bring an end to that discord.

B. The Question Presented Is a Matter of National Importance

The Ninth Circuit's decision has sweeping consequences. It distorts the proper standard for injunctions under the ADA, a statute that affects virtually every aspect of daily public life. It also threatens to displace traditional equitable standards under many other statutes.

1. Title III is breathtaking in scope. It seeks to guarantee all persons with disabilities "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). Public accommodations include twelve broad categories of businesses. *Id.* § 12181(7)(A)-(L). Disabilities include any "physical or mental impairment that substantially limits one or more major life activities," including "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working," as well as "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." *Id.* § 12102(1)-(2).

The Accessibility Guidelines are correspondingly extensive, "'regulat[ing] design elements down to the mi-

nutest detail.'" *Molski* v. *M.J. Cable, Inc.*, 481 F.3d 724, 732 n.5 (9th Cir. 2007). Despite their complexity, moreover, they cannot anticipate every possible situation and thus often resort to ambiguous standards like "equivalent facilitation." Businesses must make countless judgment calls about how to comply. A business that comes to a different conclusion than a court's later judgment may pay dearly for its wrong guess, having to tear down or alter its facilities. That potential liability is multiplied many times over by the sheer number of rules and extraordinary range of businesses covered.

If guessing wrong results in an automatic, financially crippling facilities-modification order without regard to the extent of irreparable harm or the public interest, businesses may go well beyond what Congress intended to avoid the risk of liability—or choose not to offer public accommodations at all. Of course, the expense and difficulty of compliance are not grounds for refusing to enforce a statute according to the terms Congress enacted. But engrafting onto a statute an unusually liberal standard for injunctive relief—as opposed to the traditional standard Congress anticipated—frustrates rather than furthers the balance that Congress struck.

2. The circuit conflict over whether a statute's express provision for injunctive relief excuses plaintiffs from meeting the traditional equitable requirements extends well beyond the ADA. The cases that have already wrestled with that question cover an astonishing array of statutes. They include the National Labor Relations Act, *Muffley*, 570 F.3d at 542; *Sharp*, 172 F.3d at 1038, the Clean Water Act, *Texaco Refining*, 906 F.2d at 937, the Resource Conservation and Recovery Act, *Marine Shale*, 81 F.3d at 1359-1360, the Ocean Dumping Act, *Town of Huntington*, 859 F.2d at 1143, the National Environmen-

tal Policy Act, *ibid.*, the Railroad Revitalization and Regulatory Reform Act, *Lennen*, 640 F.2d at 260; *CSX*, 964 F.2d at 550-551; *Trailer Train*, 697 F.2d at 869, the Uniformed Services Employment and Reemployment Rights Act, *Bedrossian*, 409 F.3d at 842-843, and the Fair Housing Act, *Gresham*, 730 F.2d at 1423. The issue is bound to arise under other statutes that similarly authorize injunctive relief. See, *e.g.*, 15 U.S.C. §2073(a) (Consumer Product Safety Act); 15 U.S.C. §3006(a) (Interstate Horseracing Act); 15 U.S.C. §8131(2) (Anticybersquatting Consumer Protection Act); 18 U.S.C. §248(c)(1)(B) (Freedom of Access to Clinic Entrances Act).

In addressing violations under those myriad statutes, district courts in the Ninth Circuit may no longer exercise their traditional equitable discretion. If the circumstances here—a serial plaintiff who sued more than 20 businesses and returned to virtually none, and whom the district court specifically found to lack a "concrete" or "sincere" desire to return—make the denial of relief an abuse of discretion, there will be few instances where equity does not compel an injunction. Given the extraordinary range of statutes implicated, the Ninth Circuit's expansive standard will have far-reaching consequences indeed.

C. The Ninth Circuit's Decision Is Incorrect

Finally, the Ninth Circuit's rule is wrong. As this Court explained in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), the equitable standards governing injunctive relief reflect "'a background of several hundred years of history'"—a history "of which Congress is assuredly well aware." *Id.* at 313. "Of course, Congress may intervene and guide or control the exercise of the courts' discretion * * *." *Ibid.* But courts should "not

lightly assume that Congress has intended to depart from established principles." *Ibid.*

Nothing in Title III of the ADA evinces any intent to depart from traditional standards. The statute *authorizes* injunctive relief, but it does not *mandate* such relief. See 42 U.S.C. §12188(a)(1) (citing 42 U.S.C. §2000a-3(a)). At most, the Act restricts the form such relief may take when ordered. *Id.* §12188(a)(2). As the Ninth Circuit noted, "an injunction is the only relief available to a private party under the Act." App., *infra*, 15a. But the Act also authorizes "monetary damages to persons aggrieved" in suits by the Attorney General, as well as civil penalties. 42 U.S.C. §12188(b)(2)(B)-(C). That those remedies are unavailable in private suits does not mean injunctions should be awarded without regard to traditional standards. *Romero-Barcelo* relied on the availability of "fines and criminal penalties"—sanctions likewise unavailable in private suits—to conclude that Congress did not intend to depart from traditional criteria. 456 U.S. at 314. Title III is in that respect indistinguishable.

More fundamentally, even if Congress had authorized only injunctive relief, the most natural inference would not be that Congress intended courts to grant injunctions more liberally. It would be that Congress intended courts to grant *only injunctions*. Congress is perfectly capable of mandating injunctions if that is what it intends to do. Unless Congress "'in so many words, or by a necessary and inescapable inference,'" has required injunctive relief, courts should not do so themselves. *Romero-Barcelo*, 456 U.S. at 313. But that is what the Ninth Circuit did here.

II. The Ninth Circuit's Departure From *Lujan* Also Warrants Review

While the longstanding circuit conflict over the appropriate standards for injunctive relief is reason enough to grant the petition, the Ninth Circuit's decision also directly conflicts with *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992). That conflict, too, has wide-ranging consequences.

A. The Ninth Circuit's Decision Conflicts with *Lujan*

1. In *Lujan*, this Court addressed whether environmentalists could seek an injunction requiring the Secretary of the Interior to promulgate regulations applying the Endangered Species Act extraterritorially. The plaintiff organizations claimed they had standing to seek an injunction because their members had previously traveled to countries where the species were located and planned to return someday. See 504 U.S. at 563-564.

This Court held those plans insufficient. To seek an injunction, the Court held, a plaintiff must prove an injury that is "'actual or imminent, not "conjectural" or "hypothetical."'" 504 U.S. at 560. "[T]he affiants' profession of an 'inten[t]' to return to the places they had visited before * * * is simply not enough." *Id.* at 564. "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Ibid.* The requirement is particularly demanding where "the acts necessary to make the injury happen are at least partly within the plaintiff's own control." *Id.* at 564-565 n.2. In such cases, "the injury [must] proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." *Ibid.*

2. The Ninth Circuit's decision conflicts with *Lujan*. The district court did not merely conclude that Antoninetti lacked a concrete plan to return to the restaurants. It found that he had no *sincere desire* to return. Antoninetti's "purported desire to return to the Restaurants," the court found, "is neither concrete nor sincere or supported by the facts." App., *infra*, 87a. The court grounded that conclusion in part on Antoninetti's "history as a plaintiff in accessibility litigation." *Id.* at 88a. In every one of his more than 20 prior suits, Antoninetti had settled for a cash payment, and in all but one he "never returned to the establishment he sued after settling." *Id.* at 88a-89a.

A plaintiff's status as a serial litigant who visits establishments for the sole purpose of extracting cash settlements is plainly relevant to the sincerity of his professed desire to return—and hence his entitlement to an injunction against future harm. But the Ninth Circuit adopted an arbitrary rule against giving any meaningful weight to that status. "Courts," it held, "must tread carefully before construing a Disability Act plaintiff's history of litigation against him." App., *infra*, 14a. Because it may be "'necessary and desirable for committed individuals to bring serial litigation'" to advance the ADA's goals, the court proclaimed, courts must be "'particularly cautious' regarding 'credibility determinations that rely on a plaintiff's past [Disabilities Act] litigation.'" *Id.* at 14a-15a.[5]

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[5] The Ninth Circuit's studied refusal to announce a clear rule on this point appears to be part of a calculated strategy to avoid review. Rather than categorically prohibit courts from considering a plaintiff's serial litigation, the Ninth Circuit achieved the same result by stressing the need for "caution" and then, without further elaboration, reversing a decision that was insufficiently "cautious."

That holding is impossible to square with *Lujan*. The principle that a plaintiff must have "concrete plans" to return has constitutional dimensions. *Lujan*, 504 U.S. at 564. However "'necessary and desirable'" it may be as a matter of social policy to encourage suits under the ADA, App., *infra*, 14a, courts may not disregard the constitutional prerequisites for standing to obtain injunctive relief. The Ninth Circuit's policy ground for requiring district courts to disregard probative evidence that a plaintiff has no sincere desire to return, and thus no prospective injury to remedy, cannot be reconciled with *Lujan*.[6]

3. The Ninth Circuit did not merely bar the district court from giving any serious weight to Antoninetti's litigation history. It also required the court to give dispositive weight to the stipulation that "Antoninetti wants to be able to have the 'Chipotle experience.'" App., *infra*, 15a. The Ninth Circuit's reliance on that vague recital—in the teeth of the district court's express credibility finding that Antoninetti's "purported desire to return to the Restaurants is neither concrete nor sincere or supported by the facts," *id.* at 87a—is even more obviously contrary to *Lujan*. Such a recital cannot satisfy Article III, much less compel an exercise of the district court's discretion to grant an injunction.

As an initial matter, the stipulation by its terms does not express an intent to return to Chipotle's restaurants

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[6] Although Chipotle invoked *Lujan*'s constitutional requirements in its petition for rehearing, see pp. 12-13, *supra*, the Ninth Circuit addressed the point under the "irreparable injury" prong of the injunction standard, App., *infra*, 14a-15a. The precise rubric is immaterial, however, because a district court's equitable discretion obviously can be no broader than Article III. As this Court has noted, moreover, the two inquiries "'obviously shade into'" one another. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 103 (1983).

at all. A desire "*to be able* to have the 'Chipotle experience'" is not the same as a desire "*to have* the 'Chipotle experience.'" An abstract desire to have an *ability* is not the same as an actual desire to *do* something. But even setting aside that basic problem, the stipulation comes nowhere near the showing that *Lujan* requires. A mere "profession of an 'inten[t]' to return to the places [a plaintiff] had visited before * * * is simply not enough." *Lujan*, 504 U.S. at 564. "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Ibid.* It is hard to imagine an injury more "conjectural" or "hypothetical," *id.* at 560, or aspirations more aptly described as "'some day' intentions," *id.* at 564, than a putative desire "to be able to have the 'Chipotle experience.'" App, *infra*, 15a.

Other circuits have refused injunctions on less meager showings. For example, in *Access for America, Inc.* v. *Associated Out-Door Clubs, Inc.*, 188 F. App'x 818 (11th Cir. 2006) (unpublished), the Eleventh Circuit concluded that an ADA plaintiff lacked standing because he did not have "the requisite concrete and specific intent to return" to a racetrack. *Id.* at 818. It reached that conclusion even though the plaintiff had testified to a number of "spontaneous" visits and "signaled an intent to visit the track over Christmas vacation" and on other occasions. *Id.* at 819 (Barkett, J., dissenting). Other courts likewise follow *Lujan*'s teachings in the ADA context. See *Tandy* v. *City of Wichita*, 380 F.3d 1277, 1284 (10th Cir. 2004) (distinguishing between "[s]peculative, 'someday' intentions [that] do not support standing to seek prospective relief" and more "concrete, *present* plan[s] to use [a facility] several times *each* year"); *Steger* v. *Franco, Inc.*, 228

F.3d 889, 893 (8th Cir. 2000) ("Intent to return to the place of injury 'some day' is insufficient."). The Ninth Circuit flouted those requirements here.

B. The Ninth Circuit's Departure from *Lujan* Is Important

The consequences of the Ninth Circuit's decision extend far beyond this case. Across the country, serial plaintiffs are seeking out putative ADA violations and using the threat of costly redesign injunctions to extract cash settlements. The Ninth Circuit's holding, by essentially prohibiting courts from considering serial-litigant status and instead granting relief on evidence as thin as a desire "to be able to have the 'Chipotle experience,'" practically guarantees this business model will thrive.

Time and again courts have encountered the "[c]ottage [i]ndustry" of serial ADA litigation. *Rodriguez* v. *Investco, LLC*, 305 F. Supp. 2d 1278, 1280-1282 (M.D. Fla. 2004). One attorney and his partners filed more than 700 lawsuits against Florida businesses, primarily on behalf of the attorney's elderly uncle, and typically settled them for $3,000 to $5,000 apiece. See Bob Van Voris, *South Florida's ADA Industry: Lawyer, Partners File 740 Suits on Behalf of Disabled*, Nat'l L.J., July 16, 2001, at A1. Two other lawyers filed some 600 lawsuits on behalf of their neighbor's young daughter against establishments that included a liquor store and a pawnshop. See *ADA Notification Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 5, 10 (May 18, 2000). Another filed more than 500 lawsuits in Hawaii on behalf of his "octogenarian mother-in-law." Walter Olson, *The ADA Shakedown Racket*, City J., Winter 2004, http://www.city-journal.org/html/14_1_the_ada_shakedown.html. A disabled man in California sued over 500 businesses. *Ibid.* And a small law firm in

Philadelphia sued more than 100 businesses on behalf of two individuals with ties to a non-profit institute that announced plans "'to roll out 400 to 500 suits a month until more than 5,000 businesses have been cited for ADA violations.'" *Ibid.*; see also *Molski* v. *Evergreen Dynasty Corp.*, 500 F.3d 1047, 1050 (9th Cir. 2007) (400 lawsuits); Carri Becker, *Private Enforcement of the Americans with Disabilities Act via Serial Litigation: Abusive or Commendable?*, 17 Hastings Women's L.J. 93, 97-99 (2006) ("ADA lawsuit abuse is prolific throughout the nation * * * ."). The abuse has become so widespread that it has generated almost half a dozen legislative proposals—albeit none successful. See Becker, *supra*, at 106-108 (listing bills).

Many courts have properly considered a plaintiff's past litigation in evaluating his standing to sue. In *Brother* v. *CPL Investments, Inc.*, 317 F. Supp. 2d 1358 (S.D. Fla. 2004), the plaintiff had brought more than 50 ADA lawsuits in the past year and visited the hotel he sued only once, to inspect it for violations. *Id.* at 1360-1361. The court therefore refused to "credit [his] allegation that he intended to patronize the hotel." *Id.* at 1369. Another court concluded that the same plaintiff "failed to satisfy the requirements of Article III" because his "extensive litigation history" rendered "implausible" his "professed * * * intent to return to all fifty-four of the properties he ha[d] sued." *Brother* v. *Tiger Partner, LLC*, 331 F. Supp. 2d 1368, 1373-1375 (M.D. Fla. 2004); see also *Lamb* v. *Charlotte County*, 429 F. Supp. 2d 1302, 1310-1311 (M.D. Fla. 2006) (plaintiff lacked standing because, among other things, his "numerous lawsuits under Titles II and III of the ADA" rendered "his allegations of intent to return to the property in question * * * not credible"); *Judy* v. *Pingue*, No. 2:08-cv-859, 2009 WL

2146209, at *3-6 (S.D. Ohio July 14, 2009) (ordering discovery on litigation history because it "is relevant to the plaintiff's intent, or lack thereof, to return").

Once again, however, the Ninth Circuit has charted its own course. The decision below effectively precludes courts from considering a plaintiff's litigation history and instead directs them to give dispositive weight to vague "'some day' intentions" to return—or worse still, desires to have the *ability* to return. The decision thus provides a roadmap for future serial litigants who want "to be able to have" the "Home Depot experience," the "Wal-Mart experience," or the experience of any other business willing to settle rather than face the crushing expense of a facilities-modification injunction. The fact that proof falling so woefully short of *Lujan*'s *constitutional* requirements is now so exalted in the Ninth Circuit that it renders a district court's failure to grant an injunction an *abuse of discretion* underscores how far the Ninth Circuit has departed from traditional equitable standards. For that reason too, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2011

APPENDIX

APPENDIX A
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOS. 08-55867, 08-55946, 09-55327, 09-55425
D.C. NO. 3:05-CV-01660-J-WMC

MAURIZIO ANTONINETTI,
Plaintiff-Appellant, Cross-Appellee,

v.

CHIPOTLE MEXICAN GRILL, INC.,
Defendant-Appellee, Cross-Appellant.

Appeal from the United States District Court
for the Southern District of California
Napoleon A. Jones, District Judge, Presiding

ARGUED AND SUBMITTED
APRIL 7, 2010—PASADENA, CALIFORNIA
FILED JULY 26, 2010
AMENDED SEPTEMBER 22, 2010

ORDER AND AMENDED OPINION

Before: DANIEL M. FRIEDMAN,* DOROTHY W. NELSON, and STEPHEN REINHARDT, Circuit Judges.

Opinion by Judge Friedman

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* Daniel M. Friedman, United States Circuit Judge for the Federal Circuit, sitting by designation.

ORDER

The opinion filed July 26, 2010 is amended as follows. On page 10643 of the slip opinion, after the sentence, "We must therefore be 'particularly cautious' regarding 'credibility determinations that rely on a plaintiff's past [Disabilities Act] litigation.' *Id.*," insert the following text:

> Such caution is especially appropriate in this case where, as previously noted, Chipotle stipulated that "Antoninetti wants to be able to have the 'Chipotle experience.'" Accordingly, there can be no doubt that Antoninetti wanted to return to the Chipotle restaurants to enjoy the same experience that other non-disabled Chipotle customers could have. The district court's finding thus is inconsistent with and totally undermined by the parties' stipulation.

With these amendments, the petition for rehearing is DENIED. No judge has requested a vote on the petition for rehearing en banc. The petition for rehearing en banc is DENIED. No further petitions will be entertained.

OPINION

FRIEDMAN, Circuit Judge:

This case presents several issues involving the application of the Americans with Disabilities Act ("Disabilities Act" or "Act") to a wheelchair-bound customer of the well-known Mexican fast-food restaurants operated by Chipotle Mexican Grill, Inc. ("Chipotle"). The question on the merits is whether the actions Chipotle took to accommodate the customer's disability satisfied the requirements of the Act and its implementing guidelines. We hold that they did not and accordingly that Chipotle violated the Act. Another question is whether the district

court erred in denying the customer injunctive relief. We hold that, under the circumstances, the district court should grant injunctive relief. We also vacate the district court's award of attorney's fees, which was substantially less than the customer had sought, and direct reconsideration of the amount of the fee in light of our ruling on the merits. We affirm-in-part, reverse-in-part, vacate-in-part, and remand to the district court for further proceedings.

I

A. The case arises out of visits by the appellant, Maurizio Antoninetti, to two Chipotle restaurants in California, one in San Diego and one in Encinitas. Antoninetti is a paraplegic who uses a wheelchair for mobility. He visited the San Diego restaurant six times, four times as a customer and twice to gather evidence for this litigation. He visited the Encinitas restaurant twice, once as a customer and once in connection with discovery proceedings in this case.

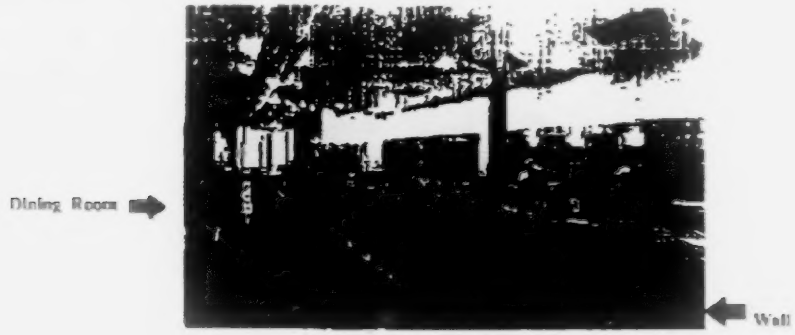
The physical arrangements of the two restaurants were, insofar as the issues in this case are involved, substantially the same. Customers walk along a line that is next to a long counter containing the different foods that are available and on which the customers' individual orders are prepared. The customers' walking line is separated from this "food preparation counter" by a separator wall. This wall rises 45 inches above the floor; the food preparation counter is 34-35 inches high.

As customers proceed through the line, they see the different foods available by looking over the wall, and they tell the food service employees behind the food preparation counter what they want. There are many kinds of foods available—such as salsa, guacamole, cheese, and lettuce—and each ingredient is described on

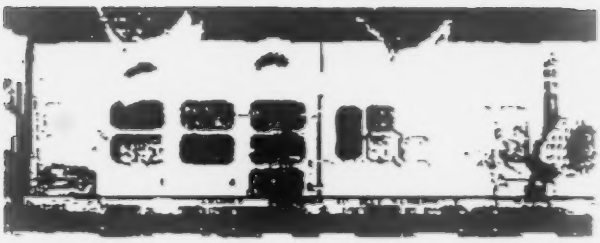
written menus in the restaurant as well as on large menu boards above the food preparation counter. The employees then assemble the customer's order—customizing the burrito, taco, or other Mexican food selected—while the customer watches.

At the end of the food preparation counter is a 4 foot-long counter containing the cash register and a 2-3 foot-long empty space. This counter, called the "transaction station," is 34 inches high, and is where the customer pays for and receives the order. The wall ends where this counter begins. Beyond the transaction station is a dining room with fixed seating, which customers may use after receiving their order.

The serving area of the restaurant is shown in the first photograph below. The second photograph shows the displayed food, as seen from above.



Customer Line



BEST AVAILABLE COPY

The parties stipulated that the average eye level of persons in wheelchairs is 43 to 51 inches above the restaurant floor; and that, at a distance of 12 inches from the wall, a person at any height within that average range cannot see the food preparation counter or the food on display there.

According to Chipotle, it "strives to offer a unique experience consisting of the architecture, décor, and music of its restaurants, the aroma of the food, the appearance of a customer's entrée, friendly staff, a tradition of excellent customer service, [the] ability to customize one's entrée, and . . . the taste of the food." It describes this as the "Chipotle experience."

Prior to this litigation, Chipotle had an unwritten policy of accommodating customers in wheelchairs who wanted to see the available food ingredients or watch the preparation of their food. When customers in wheelchairs so indicated, employees were required to show them samples of the available foods in serving spoons, held in tongs or in plastic portion cups, or to assemble the food either at the "transaction station" or at a table in the restaurant's seating area.

In February 2007, because of this litigation, Chipotle adopted its written "Customers With Disabilities Policy" (the "written policy"). This policy provides that "the restaurant staff will offer . . . [a] customer with a disability (for example, a visual or mobility impairment)"

> a suitable accommodation based on the individual circumstances, and will be responsive to the customer's requests. Depending on the circumstances, our crew member or manager may ask the customer if we can accommodate them during their visit. Examples of some of the ways we accommodate individuals include:

1. Samples of the food can be placed in soufflé cups and shown or handed to the customer.
2. Some customers may prefer an opportunity to see or even sample the food at a table.
3. Customers may simply wish to have the food or food preparation process described to them.
4. Or combinations of the above accommodations with any other reasonable accommodation requested or appropriate for the individual.

Antoninetti has not visited either restaurant since this written policy was implemented. The parties have stipulated, however, that Antoninetti still wishes to enjoy the "Chipotle experience"—seeing all the ingredients on display and watching his burrito assembled and rolled—quickly and without inconveniencing employees or other customers.

B. Following his experiences as a customer in the two restaurants, Antoninetti filed the present suit against Chipotle in the United States District Court for the Southern District of California. He alleged that Chipotle's treatment of wheelchair-bound customers violates the Disabilities Act. He sought injunctive relief and damages under a California statute that authorizes damages for violations of the federal Disabilities Act.

After granting partial summary judgment and holding a bench trial, the district court:

1. Held that Chipotle's earlier unwritten policy for accommodating customers in wheelchairs violated the Disabilities Act, but that its current "written policy" complied with the Act;

2. Denied injunctive relief;

3. Held that Antoninetti was a prevailing party in the litigation, and awarded him attorney's fees of $136,537.83—considerably less than he had sought; and

4. Awarded him $5,000 under the California damages statute (discussed in part V below).

II

Title III of the Disabilities Act requires that "public accommodations" built for first occupancy after January 26, 1993, be "readily accessible to and usable by individuals with disabilities." *See* 42 U.S.C. § 12183(a)(1). To satisfy this standard, "[n]ew construction and alterations . . . [must] comply with the standards for accessible design" promulgated by the Attorney General of the United States. *See* 28 C.F.R. 36.406(a). The Attorney General has issued detailed, primarily architectural, standards—known as the Guidelines—that govern the applicability of the Act to a variety of public accommodations. Failure to comply with the Guidelines constitutes prohibited "discrimination for the purposes of" the Disabilities Act. *See* 42 U.S.C. § 12183(a). The parties do not dispute that the two Chipotle restaurants are places of public accommodation, built after January 26, 1993, and therefore must comply with the Guidelines. Not surprisingly, the parties disagree about which Guideline governs this case.

A. Antoninetti argues that Guideline § 4.33.3 applies to Chipotle's food preparation counters. That Guideline provides, in pertinent part:

> **Placement of Wheelchair Locations.** Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. They shall adjoin an accessible route that also serves as a means of

> egress in case of emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.

28 C.F.R. § 36, App. A, § 4.33.3. Antoninetti argues that because Guideline § 4.33.3 guarantees "lines of sight comparable to those for members of the general public," the wall violates that Guideline because it prevents customers in wheelchairs from seeing the food preparation counter. The district court granted summary judgment to Chipotle on this contention, holding that the plain language of this Guideline does not cover Chipotle's food preparation counter. We agree.

The basic flaw in Antoninetti's contention is that Guideline § 4.33.3 deals with the "[p]lacement of [w]heelchair [l]ocations" as "an integral part of any fixed seating plan." *Id.* The food service area of the two restaurants is not "part of any fixed seating plan," because there are no seats there, fixed or mobile, nor any "wheelchair locations" that have been "place[d]." The customers move through the service line, past the food preparation station, and on to the cash register. Only after doing so do they proceed to the seating area in the restaurant.

Furthermore, Guideline § 4.33.3 does not govern here because it addresses a different situation, namely the accessibility for the handicapped of fixed-seating structures in which people view performances or events, such as theatres, concert halls, athletic stadia, and the like. *See, e.g., Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 583 (D.C. Cir. 1997). Guideline § 4.33.3 re-

quires "admission prices and lines of sight comparable to those for members of the general public." 28 C.F.R. § 36, App. A, § 4.33.3. It also requires that "[a]t least one companion fixed seat shall be provided next to each wheelchair seating area" and that "[w]hen the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location." *Id.*

B. Chipotle argues, and the district court held, that Guideline § 7.2 provides the governing standard here. That Guideline, titled "Sales and Service Counters, Teller Windows, Information Counters," (in § 7.2(2)) provides:

> At ticketing counters, teller stations in a bank, registration counters in hotels and motels, box office ticket counters, and other counters that may not have a cash register but at which goods or services are sold or distributed, either:
>
> (i) a portion of the main counter which is a minimum of 36 [inches] . . . in length shall be provided with a maximum height of 36 [inches] . . . or
>
> (ii) an auxiliary counter with a maximum height of 36 [inches] . . . in close proximity to the main counter shall be provided; or
>
> (iii) equivalent facilitation shall be provided (e.g., at a hotel registration counter, equivalent facilitation might consist of: (1) provision of a folding shelf attached to the main counter on which an individual with disabilities can write, and (2) use of the space on the side of the counter or at the concierge desk, for handing materials back and forth).

28 C.F.R. § 36, App. A, § 7.2(2).

We agree with the district court that this provision applies. The food service areas of the two restaurants

are "counters" and the preparation of the customers' food orders is the sale and distribution of "goods or services." The "goods" are the food itself, and the "services" are the preparation of the meal the customer orders.

C. The next question is whether the two restaurants comply with that Guideline, which includes the requirement that "a portion of the main counter" have "a maximum height" of 36 inches. Chipotle contends that this requirement is satisfied because the food preparation counter adjoins the transaction station, which is 34 inches high, and therefore that either a "portion of the main counter" or an "auxiliary counter" is below the 36 inch maximum height. The district court properly rejected this argument.

Under the Guidelines, the food preparation counter and the transaction station are different entities, even though they are next to each other and adjoined. As the district court stated, these counters "serve different functions." The food preparation counter is where the different food products are located, the customers view, select, and customize the burrito, taco, or other Mexican food they select, and the food service employees prepare the order. The transaction station, which includes the cash register, is where customers pay for and collect the food they have ordered. Because the portion of the counter that Chipotle relies on as being less than 36 inches high is neither a "portion of the main" food preparation counter nor an "auxiliary" food preparation counter, the requirements of either Guideline §§ 7.2(2)(i) or 7.2(2)(ii) are not met. In these circumstances, the wall conceals the food preparation counter from wheelchair-bound customers and thus prevents those customers from having the experience of non-disabled customers of fully participating in the selection and preparation of

their order at the food preparation counter. The wall subjects them to a disadvantage that non-disabled customers do not suffer.

D. Guideline 7.2(2) provides that, if a counter does not meet the height requirements set forth in § 7.2(2)(i) or § 7.2(2)(ii):

> [E]quivalent facilitation shall be provided: (e.g., at a hotel registration counter, equivalent facilitation might consist of: (1) provision of a folding shelf attached to the main counter on which an individual with disabilities can write, and (2) use of the space on the side of the counter or at the concierge desk, for handing materials back and forth).

28 C.F.R. § 36, App. A, § 7.2(2)(iii). The Guidelines define "[e]quivalent facilitation" as:

> Departures from particular technical and scoping requirements . . . by the use of other designs and technologies . . . where the alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility.

Id. § 36, App. A, § 2.2.

The district court held that Chipotle's written policy constituted "equivalent facilitation," but that its prior unwritten policy did not, because the written policy "imposes two new requirements," namely:

> (1) . . . [I]t is the responsibility of the manager on duty at the [r]estaurant, rather than his or her crew members, to carry out the policy . . . and (2) . . . [T]he manager on duty must affirmatively inform the customer with a disability of the various accommodations options without waiting for the customer to request them through oral communications or non-oral cues.

Initially, the parties dispute whether any "policy" may constitute "equivalent facilitation." The issue, however, is not the form in which a policy is adopted and applied, but whether the substance of the policy satisfies the Guideline requirements of "equivalent facilitation." The two "new requirements" of the written policy that the district court relied on to show "equivalent facilitation" are unavailing because they relate only to the manner of applying that policy, not its substance.

As noted, the presence of the wall in the two restaurants significantly reduced Antoninetti's ability to enjoy the "Chipotle experience." From his wheelchair, he could not see and evaluate the various available foods and decide which or how much of each he wanted. He also could not watch the food service employee combine those ingredients to form his order. The substitutes that Chipotle provided—showing him samples of the individual foods in serving spoons, held in tongs or in plastic cups, or assembling the food at the "transaction station" or at a table in the seating area—do not constitute "equivalent facilitation" because they do not involve "use of other designs and technologies" or "provide [him with] substantially equivalent or greater access to and usability of the facility." They merely provide a substitute experience that lacks the customer's personal participation in the selection and preparation of the food that the full "Chipotle experience" furnishes.

In light of this conclusion, we need not decide whether, as Antoninetti and the *amici* argue, "equivalent facilitation" requires that the facilitating "alternative designs and techniques" be architectural or physical, and cannot be a particular kind of service or policy.

In sum, Chipotle's treatment of Antoninetti during his visits as a customer of the two restaurants violated the

Disabilities Act, because it did not comply with the Guidelines.

III

The enforcement provisions of the Disabilities Act, 42 U.S.C. § 12188, provide that the "remedy and procedures" of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(a), are available "to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter." 42 U.S.C. § 12188(a)(1). The referenced provision of the Civil Rights Act states that a "person aggrieved" by a violation of that Act may file "a civil action for preventive relief, including an application for a permanent or temporary injunction." 42 U.S.C. § 2000a-3(a). The Disabilities Act provides that, in cases of discrimination in places of public accommodation,

> injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this subchapter.

42 U.S.C. § 12188(a)(2).

Injunctive relief is the sole remedy available to private parties under the Disabilities Act; it does not authorize a claim for money damages. *See, e.g., Wander v. Kaus*, 304 F.3d 856, 858 (9th Cir. 2002).

Antoninetti sought an injunction requiring Chipotle to lower the wall that prevented wheelchair-bound customers from observing the food preparation counters in the two restaurants.

The district court denied an injunction. It applied the traditional equity test: injunctive relief is appropriate when a party demonstrates "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *See eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

The court found that Antoninetti had failed to show irreparable injury because he had not revisited either restaurant after Chipotle adopted its written policy and because his "purported desire to return to the [r]estaurants is neither concrete nor sincere or supported by the facts." It also stated that Antoninetti's "history as a plaintiff in accessibility litigation supports this Court's finding that his purported desire to return to the [r]estaurants is not sincere. Since immigrating to the United States in 1991, Plaintiff has sued over twenty business entities for alleged accessibility violations, and, in all (but one) of those cases, he never returned to the establishment he sued after settling the case and obtaining a cash payment."

Courts must tread carefully before construing a Disability Act plaintiff's history of litigation against him. As we have noted more than once, "[f]or the [Disabilities Act] to yield its promise of equal access for the disabled, it may indeed be necessary and desirable for committed individuals to bring serial litigation advancing the time when public accommodations will be compliant with the [Disabilities Act]." *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1040 (9th Cir. 2008) (quoting *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1062 (9th Cir. 2007) (citing Samuel R. Bagnestos, *The Perversity of*

Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation, 54 UCLA L. Rev. 1, 5 (2006))). We must therefore be "particularly cautious" regarding "credibility determinations that rely on a plaintiff's past [Disabilities Act] litigation." *Id.* Such caution is especially appropriate in this case where, as previously noted, Chipotle stipulated that "Antoninetti wants to be able to have the 'Chipotle experience.'" Accordingly, there can be no doubt that Antoninetti wanted to return to the Chipotle restaurants to enjoy the same experience that other non-disabled Chipotle customers could have. The district court's finding thus is inconsistent with and totally undermined by the parties' stipulation.

In any event, in its present posture, this is a quite different case from the one the district court decided. We have held that the wall in the two restaurants violates the Disabilities Act, and that neither Chipotle's new or old policies ameliorated the violation. Considering all the circumstances, including particularly the statutory violations we have found and the fact that an injunction is the only relief available to a private party under the Act, it would be an abuse of discretion for the district court now to deny injunctive relief.

Accordingly, we shall reverse the district court's denial of such relief and remand the case with instructions to that court to enter an appropriate injunction. The precise contours of such an injunction are for the district court to determine in the first instance.

In view of that conclusion and disposition, we need not address the question, which the parties vigorously dispute but which the district court did not decide, whether the Disabilities Act authorizes a district court to deny injunctive relief after finding a violation of the Act. This court has refrained from deciding "whether the [Disabili-

ties Act] forecloses the possibility that a court might exercise its equitable discretion in fashioning relief for violations" of the Act. *See Long v. Coast Resorts, Inc.*, 267 F.3d 918, 923 (9th Cir. 2001). It has stated, however, that "[t]he standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief." *Silver Stage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001) (quoting *Burlington N. R.R. Co. v. Dep't of Revenue*, 934 F.2d 1064, 1074 (9th Cir. 1991); *see also Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 1040 (9th Cir. 2009) (noting that injunctive relief under the "stay put" provision of the Individuals with Disabilities Education Act "requires no specific showing on the part of the moving party, and no balancing of equities by the court").

IV

Under the Disabilities Act, "the court . . . in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and costs." 42 U.S.C. § 12205. As the Supreme Court recently reiterated, under federal fee-shifting statutes "the lodestar approach" is "the guiding light" in determining a "reasonable" fee. *See Perdue v. Kenny A.*, 599 U.S. __, __, 130 S. Ct. 1662, 1671-73 (2010) (internal quotation marks omitted). Under that method, the court first determines the appropriate hourly rate for the work performed, and then multiplies that amount by the number of hours properly expended in doing the work. *Id.* Although "in extraordinary circumstances" the amount produced by the lodestar calculation may be increased, "there is a strong presumption that the lodestar is sufficient." *Id.* at 1669.

In its two opinions determining a reasonable attorney's fee in this case, the district court apparently applied the lodestar method. Neither order explicitly stated or explained the hourly rate that the court used. Antoninetti's lawyer stated at the hearing on attorney's fees that she was "requesting" an hourly rate of $375, which Chipotle did not challenge; the district court apparently used this figure in its calculations.

The district court held that the fee awarded should reflect the "limited success" Antoninetti achieved. The court pointed out that he had prevailed on only two of his claims: that Chipotle's earlier policy violated the Act, and that he was entitled to damages under the California statute. The district court ruled that Antoninetti's "billing records make it impossible for the Court to identify specific hours associated with unsuccessful claims" and that it was "appropriate to simply reduce the award by a designated amount."

Antoninetti sought attorney's fees of $546,151.33. Because of his limited success, the court "F[OU]ND[ ] that plaintiff is entitled to one-quarter of the attorneys' fees that he has requested," and awarded him $136,537.83.

The results of this litigation are now quite different than they were when the district court made that award. Under our decision today, Antoninetti has prevailed on the two major issues that he lost before the district court. We have held that Chipotle's treatment of him in the two restaurants violated the Disabilities Act, and that the district court must provide injunctive relief.

In light of this changed outcome, the district court should reexamine and reconsider its attorney's fee award. We express no view on what would be a reasonable fee in light of the changed circumstances. That de-

termination is one that initially is for the informed discretion of the district court.

V

The California Disabled Persons Act ("California Act") provides that violation of an individual's rights under the Disabilities Act also constitutes a violation of the California Act. Cal. Civ. Code § 54(c). One who commits such violation is "liable for each offense for the actual damages and any amount as may be determined by a jury, or the court sitting without a jury, up to a maximum of three times the amount of actual damages but in no case less than one thousand dollars ($1,000), and attorney's fees as may be determined by the court in addition thereto." Cal. Civ. Code § 54.3.

In order "to maintain an action for damages pursuant to [the California Act] an individual must . . . establish[ ] that he or she was denied equal access on a particular occasion." *Donald v. Café Royale, Inc.*, 218 Cal. App. 3d 168, 183 (Cal. Ct. App. 1990) (emphasis omitted). Antoninetti therefore must show that "he actually presented himself to the restaurant on a particular occasion, as any other customer would do, with the intent of being . . . served and to purchase food . . . in the manner offered . . . . [and] actually encountered access to . . . the restaurant that was not full and equal." *Reycraft v. Lee*, 177 Cal. App. 4th 1211, 1226 (Cal. Ct. App. 2009).

Antoninetti made eight visits to the two restaurants, five as a customer and three in connection with his lawsuit. The district court awarded him $1,000 damages under the California Act for each of his five visits as a customer, but did not make any award for his three litigation-related visits. The record indicates that these damages awards were based on Chipotle's violations of the Guidelines in the restaurants' parking lots (an issue not

here disputed), not on the violations of the Act in the food service areas that we have found. Chipotle has since rectified the parking lot violations. In his notice of appeal, Antoninetti challenges the district court's judgment "with respect to the denial of additional damages . . . based upon violations of the Americans with Disabilities Act by Chipotle . . . . [but] does not appeal the amount of damages already awarded."

The violations of the Disabilities Act we have found are that, because of the wall, Antoninetti was unable to see the food arranged on the food counter or the preparation of his order, as non-wheelchair-bound customers could do, and thus was unable to enjoy the "Chipotle experience." Those violations necessarily occurred only when he visited the restaurants to purchase food and sat in line in his wheelchair. On those visits when he was not seeking to purchase food or to have the "Chipotle experience," Antoninetti cannot recover money damages under the California Act.

It is unclear whether Antoninetti is challenging the district court's failure to award damages for the five food service area violations we have found (in addition to the parking lot violations), or, if so, whether he has properly preserved that issue. In his notice of appeal, he challenged the district court's judgment "with respect to the denial of additional damages"—an ambiguous phrase that could cover only the litigation-related visits, or also could cover the food service area violations. The record does not show whether Antoninetti purchased food on any of his three litigation-related visits, although he stated in his opening brief: "Nor was any evidence offered at any time that Antoninetti's purchases during these [litigation-related] visits were made in bad faith or with fraud or deceit." Moreover, the district court has

not considered the amount of additional damages, if any, that should be awarded for the violations not related to parking.

We vacate the damages award and remand for further proceedings on this issue.

CONCLUSION

The judgment of the district court is affirmed insofar as it ruled that Chipotle's unwritten earlier policy violated the Disabilities Act. The portions of the judgment determining that Chipotle's written policy did not violate the Act and that Antoninetti was not entitled to an injunction are reversed, and the case is remanded to the district court to enter a judgment that Chipotle violated the Disabilities Act and to issue appropriate injunctive relief. The portions of the judgment that awarded an attorney's fee of $136,537.83 and awarded damages of $5,000 under the California Act are vacated and the case is remanded for the district court to reconsider those issues.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART AND REMANDED.

APPENDIX B
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOS. 08-55867, 08-55946, 09-55327, 09-55425
D.C. NO. 3:05-CV-01660-J-WMC

MAURIZIO ANTONINETTI,
Plaintiff-Appellant, Cross-Appellee,

v.

CHIPOTLE MEXICAN GRILL, INC.,
Defendant-Appellee, Cross-Appellant.

Appeal from the United States District Court
for the Southern District of California
Napoleon A. Jones, District Judge, Presiding

ARGUED AND SUBMITTED
APRIL 7, 2010—PASADENA, CALIFORNIA
FILED JULY 26, 2010

OPINION

Before: DANIEL M. FRIEDMAN,*
DOROTHY W. NELSON, and STEPHEN
REINHARDT, Circuit Judges.

Opinion by Judge Friedman

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* Daniel M. Friedman, United States Circuit Judge for the Federal Circuit, sitting by designation.

OPINION

FRIEDMAN, Circuit Judge:

This case presents several issues involving the application of the Americans with Disabilities Act ("Disabilities Act" or "Act") to a wheelchair-bound customer of the well-known Mexican fast-food restaurants operated by Chipotle Mexican Grill, Inc. ("Chipotle"). The question on the merits is whether the actions Chipotle took to accommodate the customer's disability satisfied the requirements of the Act and its implementing guidelines. We hold that they did not and accordingly that Chipotle violated the Act. Another question is whether the district court erred in denying the customer injunctive relief. We hold that, under the circumstances, the district court should grant injunctive relief. We also vacate the district court's award of attorney's fees, which was substantially less than the customer had sought, and direct reconsideration of the amount of the fee in light of our ruling on the merits. We affirm-in-part, reverse-in-part, vacate-in-part, and remand to the district court for further proceedings.

I

A. The case arises out of visits by the appellant, Maurizio Antoninetti, to two Chipotle restaurants in California, one in San Diego and one in Encinitas. Antoninetti is a paraplegic who uses a wheelchair for mobility. He visited the San Diego restaurant six times, four times as a customer and twice to gather evidence for this litigation. He visited the Encinitas restaurant twice, once as a customer and once in connection with discovery proceedings in this case.

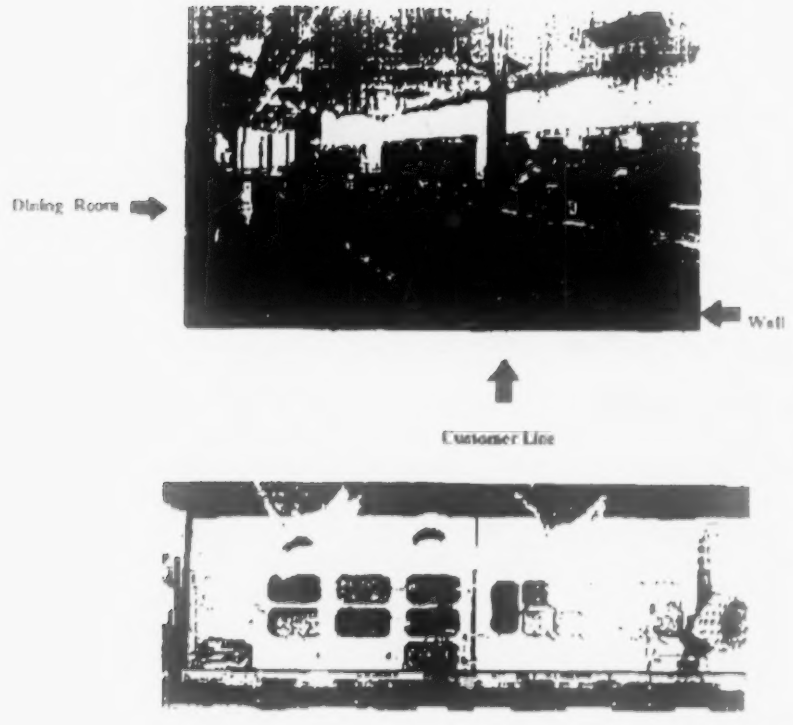
The physical arrangements of the two restaurants were, insofar as the issues in this case are involved, substantially the same. Customers walk along a line that is

next to a long counter containing the different foods that are available and on which the customers' individual orders are prepared. The customers' walking line is separated from this "food preparation counter" by a separator wall. This wall rises 45 inches above the floor; the food preparation counter is 34-35 inches high.

As customers proceed through the line, they see the different foods available by looking over the wall, and they tell the food service employees behind the food preparation counter what they want. There are many kinds of foods available—such as salsa, guacamole, cheese, and lettuce—and each ingredient is described on written menus in the restaurant as well as on large menu boards above the food preparation counter. The employees then assemble the customer's order—customizing the burrito, taco, or other Mexican food selected—while the customer watches.

At the end of the food preparation counter is a 4 foot-long counter containing the cash register and a 2-3 foot-long empty space. This counter, called the "transaction station," is 34 inches high, and is where the customer pays for and receives the order. The wall ends where this counter begins. Beyond the transaction station is a dining room with fixed seating, which customers may use after receiving their order.

The serving area of the restaurant is shown in the first photograph below. The second photograph shows the displayed food, as seen from above.



The parties stipulated that the average eye level of persons in wheelchairs is 43 to 51 inches above the restaurant floor; and that, at a distance of 12 inches from the wall, a person at any height within that average range cannot see the food preparation counter or the food on display there.

According to Chipotle, it "strives to offer a unique experience consisting of the architecture, décor, and music of its restaurants, the aroma of the food, the appearance of a customer's entrée, friendly staff, a tradition of excellent customer service, [the] ability to customize one's entrée, and . . . the taste of the food." It describes this as the "Chipotle experience."

Prior to this litigation, Chipotle had an unwritten policy of accommodating customers in wheelchairs who wanted to see the available food ingredients or watch the preparation of their food. When customers in wheelchairs so indicated, employees were required to show them samples of the available foods in serving spoons, held in tongs or in plastic portion cups, or to assemble the food either at the "transaction station" or at a table in the restaurant's seating area.

In February 2007, because of this litigation, Chipotle adopted its written "Customers With Disabilities Policy" (the "written policy"). This policy provides that "the restaurant staff will offer . . . [a] customer with a disability (for example, a visual or mobility impairment)"

> a suitable accommodation based on the individual circumstances, and will be responsive to the customer's requests. Depending on the circumstances, our crew member or manager may ask the customer if we can accommodate them during their visit. Examples of some of the ways we accommodate individuals include:
>
> 1. Samples of the food can be placed in soufflé cups and shown or handed to the customer.
> 2. Some customers may prefer an opportunity to see or even sample the food at a table.
> 3. Customers may simply wish to have the food or food preparation process described to them.
> 4. Or combinations of the above accommodations with any other reasonable accommodation requested or appropriate for the individual.

Antoninetti has not visited either restaurant since this written policy was implemented. The parties have stipu-

lated, however, that Antoninetti still wishes to enjoy the "Chipotle experience"—seeing all the ingredients on display and watching his burrito assembled and rolled—quickly and without inconveniencing employees or other customers.

B. Following his experiences as a customer in the two restaurants, Antoninetti filed the present suit against Chipotle in the United States District Court for the Southern District of California. He alleged that Chipotle's treatment of wheelchair-bound customers violates the Disabilities Act. He sought injunctive relief and damages under a California statute that authorizes damages for violations of the federal Disabilities Act.

After granting partial summary judgment and holding a bench trial, the district court:

1. Held that Chipotle's earlier unwritten policy for accommodating customers in wheelchairs violated the Disabilities Act, but that its current "written policy" complied with the Act;

2. Denied injunctive relief;

3. Held that Antoninetti was a prevailing party in the litigation, and awarded him attorney's fees of $136,537.83—considerably less than he had sought; and

4. Awarded him $5,000 under the California damages statute (discussed in part V below).

II

Title III of the Disabilities Act requires that "public accommodations" built for first occupancy after January 26, 1993, be "readily accessible to and usable by individuals with disabilities." *See* 42 U.S.C. § 12183(a)(1). To satisfy this standard, "[n]ew construction and alterations . . . [must] comply with the standards for accessible design" promulgated by the Attorney General of the United

States. *See* 28 C.F.R. 36.406(a). The Attorney General has issued detailed, primarily architectural, standards—known as the Guidelines—that govern the applicability of the Act to a variety of public accommodations. Failure to comply with the Guidelines constitutes prohibited "discrimination for the purposes of" the Disabilities Act. *See* 42 U.S.C. § 12183(a). The parties do not dispute that the two Chipotle restaurants are places of public accommodation, built after January 26, 1993, and therefore must comply with the Guidelines. Not surprisingly, the parties disagree about which Guideline governs this case.

A. Antoninetti argues that Guideline § 4.33.3 applies to Chipotle's food preparation counters. That Guideline provides, in pertinent part:

> **Placement of Wheelchair Locations.** Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. They shall adjoin an accessible route that also serves as a means of egress in case of emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.

28 C.F.R. § 36, App. A, § 4.33.3. Antoninetti argues that because Guideline § 4.33.3 guarantees "lines of sight comparable to those for members of the general public," the wall violates that Guideline because it prevents customers in wheelchairs from seeing the food preparation

counter. The district court granted summary judgment to Chipotle on this contention, holding that the plain language of this Guideline does not cover Chipotle's food preparation counter. We agree.

The basic flaw in Antoninetti's contention is that Guideline § 4.33.3 deals with the "[p]lacement of [w]heelchair [l]ocations" as "an integral part of any fixed seating plan." *Id.* The food service area of the two restaurants is not "part of any fixed seating plan," because there are no seats there, fixed or mobile, nor any "wheelchair locations" that have been "place[d]." The customers move through the service line, past the food preparation station, and on to the cash register. Only after doing so do they proceed to the seating area in the restaurant.

Furthermore, Guideline § 4.33.3 does not govern here because it addresses a different situation, namely the accessibility for the handicapped of fixed-seating structures in which people view performances or events, such as theatres, concert halls, athletic stadia, and the like. *See, e.g., Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 583 (D.C. Cir. 1997). Guideline § 4.33.3 requires "admission prices and lines of sight comparable to those for members of the general public." 28 C.F.R. § 36, App. A, § 4.33.3. It also requires that "[a]t least one companion fixed seat shall be provided next to each wheelchair seating area" and that "[w]hen the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location." *Id.*

B. Chipotle argues, and the district court held, that Guideline § 7.2 provides the governing standard here. That Guideline, titled "Sales and Service Counters, Teller Windows, Information Counters," (in § 7.2(2)) provides:

> At ticketing counters, teller stations in a bank, registration counters in hotels and motels, box office

> ticket counters, and other counters that may not have a cash register but at which goods or services are sold or distributed, either:
>
> > (i) a portion of the main counter which is a minimum of 36 [inches] . . . in length shall be provided with a maximum height of 36 [inches] . . . or
> >
> > (ii) an auxiliary counter with a maximum height of 36 [inches] . . . in close proximity to the main counter shall be provided; or
> >
> > (iii) equivalent facilitation shall be provided (e.g., at a hotel registration counter, equivalent facilitation might consist of: (1) provision of a folding shelf attached to the main counter on which an individual with disabilities can write, and (2) use of the space on the side of the counter or at the concierge desk, for handing materials back and forth).

28 C.F.R. § 36, App. A, § 7.2(2).

We agree with the district court that this provision applies. The food service areas of the two restaurants are "counters" and the preparation of the customers' food orders is the sale and distribution of "goods or services." The "goods" are the food itself, and the "services" are the preparation of the meal the customer orders.

C. The next question is whether the two restaurants comply with that Guideline, which includes the requirement that "a portion of the main counter" have "a maximum height" of 36 inches. Chipotle contends that this requirement is satisfied because the food preparation counter adjoins the transaction station, which is 34 inches high, and therefore that either a "portion of the main counter" or an "auxiliary counter" is below the 36 inch

maximum height. The district court properly rejected this argument.

Under the Guidelines, the food preparation counter and the transaction station are different entities, even though they are next to each other and adjoined. As the district court stated, these counters "serve different functions." The food preparation counter is where the different food products are located, the customers view, select, and customize the burrito, taco, or other Mexican food they select, and the food service employees prepare the order. The transaction station, which includes the cash register, is where customers pay for and collect the food they have ordered. Because the portion of the counter that Chipotle relies on as being less than 36 inches high is neither a "portion of the main" food preparation counter nor an "auxiliary" food preparation counter, the requirements of either Guideline §§ 7.2(2)(i) or 7.2(2)(ii) are not met. In these circumstances, the wall conceals the food preparation counter from wheelchair-bound customers and thus prevents those customers from having the experience of non-disabled customers of fully participating in the selection and preparation of their order at the food preparation counter. The wall subjects them to a disadvantage that non-disabled customers do not suffer.

D. Guideline 7.2(2) provides that, if a counter does not meet the height requirements set forth in § 7.2(2)(i) or § 7.2(2)(ii):

> [E]quivalent facilitation shall be provided: (e.g., at a hotel registration counter, equivalent facilitation might consist of: (1) provision of a folding shelf attached to the main counter on which an individual with disabilities can write, and (2) use of the space

> on the side of the counter or at the concierge desk, for handing materials back and forth).

28 C.F.R. § 36, App. A, § 7.2(2)(iii). The Guidelines define "[e]quivalent facilitation" as:

> Departures from particular technical and scoping requirements . . . by the use of other designs and technologies . . . where the alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility.

Id. § 36, App. A, § 2.2.

The district court held that Chipotle's written policy constituted "equivalent facilitation," but that its prior unwritten policy did not, because the written policy "imposes two new requirements," namely:

> (1) . . . [I]t is the responsibility of the manager on duty at the [r]estaurant, rather than his or her crew members, to carry out the policy . . . and (2) . . . [T]he manager on duty must affirmatively inform the customer with a disability of the various accommodations options without waiting for the customer to request them through oral communications or non-oral cues.

Initially, the parties dispute whether any "policy" may constitute "equivalent facilitation." The issue, however, is not the form in which a policy is adopted and applied, but whether the substance of the policy satisfies the Guideline requirements of "equivalent facilitation." The two "new requirements" of the written policy that the district court relied on to show "equivalent facilitation" are unavailing because they relate only to the manner of applying that policy, not its substance.

As noted, the presence of the wall in the two restaurants significantly reduced Antoninetti's ability to enjoy

the "Chipotle experience." From his wheelchair, he could not see and evaluate the various available foods and decide which or how much of each he wanted. He also could not watch the food service employee combine those ingredients to form his order. The substitutes that Chipotle provided—showing him samples of the individual foods in serving spoons, held in tongs or in plastic cups, or assembling the food at the "transaction station" or at a table in the seating area—do not constitute "equivalent facilitation" because they do not involve "use of other designs and technologies" or "provide [him with] substantially equivalent or greater access to and usability of the facility." They merely provide a substitute experience that lacks the customer's personal participation in the selection and preparation of the food that the full "Chipotle experience" furnishes.

In light of this conclusion, we need not decide whether, as Antoninetti and the *amici* argue, "equivalent facilitation" requires that the facilitating "alternative designs and techniques" be architectural or physical, and cannot be a particular kind of service or policy.

In sum, Chipotle's treatment of Antoninetti during his visits as a customer of the two restaurants violated the Disabilities Act, because it did not comply with the Guidelines.

III

The enforcement provisions of the Disabilities Act, 42 U.S.C. § 12188, provide that the "remedy and procedures" of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(a), are available "to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter." 42 U.S.C. § 12188(a)(1). The referenced provision of the Civil Rights Act states that a "person aggrieved" by a violation of that Act may file "a civil

action for preventive relief, including an application for a permanent or temporary injunction." 42 U.S.C. § 2000a-3(a). The Disabilities Act provides that, in cases of discrimination in places of public accommodation,

> injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this subchapter.

42 U.S.C. § 12188(a)(2).

Injunctive relief is the sole remedy available to private parties under the Disabilities Act; it does not authorize a claim for money damages. *See, e.g., Wander v. Kaus*, 304 F.3d 856, 858 (9th Cir. 2002).

Antoninetti sought an injunction requiring Chipotle to lower the wall that prevented wheelchair-bound customers from observing the food preparation counters in the two restaurants.

The district court denied an injunction. It applied the traditional equity test: injunctive relief is appropriate when a party demonstrates "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *See eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

The court found that Antoninetti had failed to show irreparable injury because he had not revisited either res-

taurant after Chipotle adopted its written policy and because his "purported desire to return to the [r]estaurants is neither concrete nor sincere or supported by the facts." It also stated that Antoninetti's "history as a plaintiff in accessibility litigation supports this Court's finding that his purported desire to return to the [r]estaurants is not sincere. Since immigrating to the United States in 1991, Plaintiff has sued over twenty business entities for alleged accessibility violations, and, in all (but one) of those cases, he never returned to the establishment he sued after settling the case and obtaining a cash payment."

Courts must tread carefully before construing a Disability Act plaintiff's history of litigation against him. As we have noted more than once, "[f]or the [Disabilities Act] to yield its promise of equal access for the disabled, it may indeed be necessary and desirable for committed individuals to bring serial litigation advancing the time when public accommodations will be compliant with the [Disabilities Act]." *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1040 (9th Cir. 2008) (quoting *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1062 (9th Cir. 2007) (citing Samuel R. Bagnestos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. Rev. 1, 5 (2006))). We must therefore be "particularly cautious" regarding "credibility determinations that rely on a plaintiff's past [Disabilities Act] litigation." *Id.*

In any event, in its present posture, this is a quite different case from the one the district court decided. We have held that the wall in the two restaurants violates the Disabilities Act, and that neither Chipotle's new or old policies ameliorated the violation. Considering all the circumstances, including particularly the statutory violations we have found and the fact that an injunction is the

only relief available to a private party under the Act, it would be an abuse of discretion for the district court now to deny injunctive relief.

Accordingly, we shall reverse the district court's denial of such relief and remand the case with instructions to that court to enter an appropriate injunction. The precise contours of such an injunction are for the district court to determine in the first instance.

In view of that conclusion and disposition, we need not address the question, which the parties vigorously dispute but which the district court did not decide, whether the Disabilities Act authorizes a district court to deny injunctive relief after finding a violation of the Act. This court has refrained from deciding "whether the [Disabilities Act] forecloses the possibility that a court might exercise its equitable discretion in fashioning relief for violations" of the Act. *See Long v. Coast Resorts, Inc.*, 267 F.3d 918, 923 (9th Cir. 2001). It has stated, however, that "[t]he standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief." *Silver Stage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001) (quoting *Burlington N. R.R. Co. v. Dep't of Revenue*, 934 F.2d 1064, 1074 (9th Cir. 1991); *see also Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 1040 (9th Cir. 2009) (noting that injunctive relief under the "stay put" provision of the Individuals with Disabilities Education Act "requires no specific showing on the part of the moving party, and no balancing of equities by the court").

IV

Under the Disabilities Act, "the court . . . in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and costs." 42

U.S.C. § 12205. As the Supreme Court recently reiterated, under federal fee-shifting statutes "the lodestar approach" is "the guiding light" in determining a "reasonable" fee. *See Perdue v. Kenny A.*, 599 U.S. __, __, 130 S. Ct. 1662, 1671-73 (2010) (internal quotation marks omitted). Under that method, the court first determines the appropriate hourly rate for the work performed, and then multiplies that amount by the number of hours properly expended in doing the work. *Id.* Although "in extraordinary circumstances" the amount produced by the lodestar calculation may be increased, "there is a strong presumption that the lodestar is sufficient." *Id.* at 1669.

In its two opinions determining a reasonable attorney's fee in this case, the district court apparently applied the lodestar method. Neither order explicitly stated or explained the hourly rate that the court used. Antoninetti's lawyer stated at the hearing on attorney's fees that she was "requesting" an hourly rate of $375, which Chipotle did not challenge; the district court apparently used this figure in its calculations.

The district court held that the fee awarded should reflect the "limited success" Antoninetti achieved. The court pointed out that he had prevailed on only two of his claims: that Chipotle's earlier policy violated the Act, and that he was entitled to damages under the California statute. The district court ruled that Antoninetti's "billing records make it impossible for the Court to identify specific hours associated with unsuccessful claims" and that it was "appropriate to simply reduce the award by a designated amount."

Antoninetti sought attorney's fees of $546,151.33. Because of his limited success, the court "F[OU]ND[ ] that

plaintiff is entitled to one-quarter of the attorneys' fees that he has requested," and awarded him $136,537.83.

The results of this litigation are now quite different than they were when the district court made that award. Under our decision today, Antoninetti has prevailed on the two major issues that he lost before the district court. We have held that Chipotle's treatment of him in the two restaurants violated the Disabilities Act, and that the district court must provide injunctive relief.

In light of this changed outcome, the district court should reexamine and reconsider its attorney's fee award. We express no view on what would be a reasonable fee in light of the changed circumstances. That determination is one that initially is for the informed discretion of the district court.

V

The California Disabled Persons Act ("California Act") provides that violation of an individual's rights under the Disabilities Act also constitutes a violation of the California Act. Cal. Civ. Code § 54(c). One who commits such violation is "liable for each offense for the actual damages and any amount as may be determined by a jury, or the court sitting without a jury, up to a maximum of three times the amount of actual damages but in no case less than one thousand dollars ($1,000), and attorney's fees as may be determined by the court in addition thereto." Cal. Civ. Code § 54.3.

In order "to maintain an action for damages pursuant to [the California Act] an individual must . . . establish[ ] that he or she was denied equal access on a particular occasion." *Donald v. Café Royale, Inc.*, 218 Cal. App. 3d 168, 183 (Cal. Ct. App. 1990) (emphasis omitted). Antoninetti therefore must show that "he actually presented himself to the restaurant on a particular occasion, as any

other customer would do, with the intent of being . . . served and to purchase food . . . in the manner offered . . . . [and] actually encountered access to . . . the restaurant that was not full and equal." *Reycraft v. Lee*, 177 Cal. App. 4th 1211, 1226 (Cal. Ct. App. 2009).

Antoninetti made eight visits to the two restaurants, five as a customer and three in connection with his lawsuit. The district court awarded him $1,000 damages under the California Act for each of his five visits as a customer, but did not make any award for his three litigation-related visits. The record indicates that these damages awards were based on Chipotle's violations of the Guidelines in the restaurants' parking lots (an issue not here disputed), not on the violations of the Act in the food service areas that we have found. Chipotle has since rectified the parking lot violations. In his notice of appeal, Antoninetti challenges the district court's judgment "with respect to the denial of additional damages . . . based upon violations of the Americans with Disabilities Act by Chipotle . . . . [but] does not appeal the amount of damages already awarded."

The violations of the Disabilities Act we have found are that, because of the wall, Antoninetti was unable to see the food arranged on the food counter or the preparation of his order, as non-wheelchair-bound customers could do, and thus was unable to enjoy the "Chipotle experience." Those violations necessarily occurred only when he visited the restaurants to purchase food and sat in line in his wheelchair. On those visits when he was not seeking to purchase food or to have the "Chipotle experience," Antoninetti cannot recover money damages under the California Act.

It is unclear whether Antoninetti is challenging the district court's failure to award damages for the five food

service area violations we have found (in addition to the parking lot violations), or, if so, whether he has properly preserved that issue. In his notice of appeal, he challenged the district court's judgment "with respect to the denial of additional damages"—an ambiguous phrase that could cover only the litigation-related visits, or also could cover the food service area violations. The record does not show whether Antoninetti purchased food on any of his three litigation-related visits, although he stated in his opening brief: "Nor was any evidence offered at any time that Antoninetti's purchases during these [litigation-related] visits were made in bad faith or with fraud or deceit." Moreover, the district court has not considered the amount of additional damages, if any, that should be awarded for the violations not related to parking.

We vacate the damages award and remand for further proceedings on this issue.

CONCLUSION

The judgment of the district court is affirmed insofar as it ruled that Chipotle's unwritten earlier policy violated the Disabilities Act. The portions of the judgment determining that Chipotle's written policy did not violate the Act and that Antoninetti was not entitled to an injunction are reversed, and the case is remanded to the district court to enter a judgment that Chipotle violated the Disabilities Act and to issue appropriate injunctive relief. The portions of the judgment that awarded an attorney's fee of $136,537.83 and awarded damages of $5,000 under the California Act are vacated and the case is remanded for the district court to reconsider those issues.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART AND REMANDED.

APPENDIX C
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CIVIL NO. 05CV1660-J (WMC)
RELATED TO & CONSOLIDATED FOR
DISCOVERY WITH 06CV2671 (WMC)

MAURIZIO ANTONINETTI,
Plaintiff,

v.

CHIPOTLE MEXICAN GRILL, INC., AND
DOES 1 THROUGH 10, INCLUSIVE,
Defendants.

JANUARY 10, 2008

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

NAPOLEON A. JONES, JR., District Judge.

On August 22, 2005, Plaintiff Maurizio Antoninetti ("Plaintiff") brought this action against Defendant Chipotle Mexican Grill, Inc. ("Defendant" or "Chipotle") under Title III of the Americans with Disabilities Act ("ADA") and under the California Disabled Persons Act ("CDPA").[1] Plaintiff asserted that Defendant denied him

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[1] Plaintiff also had asserted a claim under the California Unruh Civil Rights Act ("Unruh Act"). Since a party seeking damages and other relief under the CDPA may not also seek relief under the Unruh Act,

full and equal access to two of its restaurants, one located at 268 N. El Camino Real in Encinitas (the "Encinitas Restaurant") and the other located at 1504 Garnet Avenue in San Diego (the "Pacific Beach Restaurant") (collectively the "Restaurants"). Specifically, Plaintiff alleges that the 44 inch high wall in front of the Restaurants' food preparation counters obstructs his view of the preparation counters and thereby denies him the right to see the food ingredients and customize his food order.

In its June 14, 2007 Order on the Parties' Cross Motions for Summary Judgment, this Court held that Section 7.2(2) of the ADA Accessibility Guidelines ("ADAAG") applies to the wall in front of the food preparation counters at the Restaurants. Under Section 7.2(2), a portion of the main counter that is a minimum of 36 inches in length must have a maximum height of 36 inches; alternatively, an auxiliary counter with a maximum height of 36 inches must be provided in close proximity to the main counter, or some other "equivalent facilitation" must be provided. This Court found that the 34 inch high transaction station attached to the food preparation counters, at which cash registers are located, was not "a portion of the main counter" or an "auxiliary counter" within the meaning of ADAAG Subsections 7.2(2)(i) and (ii). This Court further found that a genuine factual dispute existed as to whether Defendant's practice and policy of accommodating customers with disabilities constituted an "equivalent facilitation" under ADAAG Subsection 7.2(2)(iii).[2]

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see Cal. Civ. Code § 54.3(c), Plaintiff abandoned his Unruh Act claim in favor of his CDPA claim.

[2] Plaintiff also claimed that the Restaurants' men's restrooms, seating areas and parking areas were inaccessible and that the entrances to the Pacific Beach Restaurant were inaccessible. This Court adju-

This Court held a bench trial in this action on November 27, 29, 30 and December 3, 2007. The issues presented at trial were as follows: (1) whether Defendant's prior practice of accommodating customers with disabilities constituted equivalent facilitation under Section 7.2(2)(iii); (2) whether Defendant's written Customers with Disabilities Policy constitutes equivalent facilitation under Section 7.2(2)(iii); (3) whether Plaintiff is entitled to an injunction requiring Defendant to lower the wall in front of the Restaurants' food preparation counters; and (4) the amount of damages, if any, that Plaintiff is entitled to under the CDPA based on his visits to the Restaurants.

After considering all of the evidence admitted at trial and the argument of counsel, the Court makes the following findings set forth in detail below: (1) Defendant's prior practice of accommodating customers with disabilities, including customers in wheelchairs, did not constitute equivalent facilitation under Section 7.2(2)(iii) of the ADAAG; (2) Defendant's current written Customers With Disabilities Policy constitutes equivalent facilitation under Section 7.2(2)(iii) of the ADAAG; (3) Plaintiff is not entitled to an injunction requiring Defendant to lower the

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dicated these claims in its June 17, 2007 summary judgment order. In particular, this Court: granted Defendant's Motion for Summary Judgment as to Plaintiff's ADA and CDPA claims regarding the restrooms and seating areas of the two Restaurants and the entrances to the Pacific Beach Restaurant; granted Defendant's Motion for Summary Judgment as to Plaintiff's ADA claim regarding the Restaurants' parking lots because Defendant had made alterations to the parking lots after the filing of Plaintiff's suit to ensure compliance with the ADA; and granted Plaintiff's Motion for Summary Judgment as to his CDPA damages claim related to the Restaurants' parking lots because the parking lots did not comply with the ADA prior to Defendant's alterations.

wall in front of the Restaurants' food preparation counters; and (4) Plaintiff is entitled to a total of $5000.00 in damages for the occasions on which he encountered barriers to his entrance into Defendant's restaurants.

Factual Findings

I. Chipotle Restaurants

1. Chipotle is a restaurant founded by Steve Ells, who is presently the company's Chief Executive Officer. Mr. Ells is a classically trained chef and a graduate of the Culinary Institute of America. In 1993, Mr. Ells opened the first Chipotle restaurant. In creating Chipotle, Mr. Ells sought to apply his classical training and knowledge of high-quality food and service to a quick service Mexican food restaurant. Reporter's Transcript of Court Trial in Maurizio Antoninetti v. Chipotle Mexican Grill, No. 05-CV-1660 (hereinafter "TR"), at p. 511, ln. 8 – p. 514, ln. 6 (November 30, 2007).

2. The Chipotle experience consists of the architecture, décor, and music of the restaurants, the aroma of the food, the appearance of a customer's entrée, Chipotle's friendly staff, its tradition of excellent customer service, the ability to customize one's entrée, and above all, the taste of the food. The ability to see the freshness of the quality ingredients available at Chipotle's restaurants is a significant part of the Chipotle experience but has always been of secondary importance to the appearance and taste of the food once it has been prepared and served to the customer. The most important aspect of the Chipotle experience is the experience of eating and enjoying one's food. TR, at p. 203, lns. 13-18; p. 278, ln. 19 – p. 280, ln. 18 (November 29, 2007); TR, at p. 641, ln. 1 – p. 642, ln. 5 (December 3, 2007); Ex. 58.

3. Defendant provides specific details for the appearance of its food. The chicken is required to be served

with dark caramel grill lines on it. Customers can actually see if the rice is bright white or has freshly chopped cilantro in it. If the rice, for example, is not bright white, visually fresh, with vibrant green cilantro, Chipotle staff are instructed to remove the rice. [Trial Ex. 1, p. 10-1700; 68:19-69:5; Trial Ex. 1, p. 10-1666]

4. Defendant opened the Pacific Beach Restaurant in April of 2002. Amended Pretrial Order, Section III, ¶ 9; TR, at p. 16, lns. 18-19; p. 17, ln. 24 – p. 19, ln. 7 (November 27, 2007).

5. The City of San Diego issued the Certificate of Occupancy for the Pacific Beach Restaurant on April 1, 2001. Amended Pretrial Order, Section III, ¶ 31; TR, at p. 27, lns. 16-18; p. 27, ln. 25 – p.19, ln. 7 (November 27, 2007).

6. Defendant opened the Encinitas Restaurant in May of 2002. Amended Pretrial Order, Section III, ¶ 10; TR, at p. 16, lns. 19-21; p. 17, ln. 24 – p. 19, ln. 7 (November 27, 2007).

7. The City of Encinitas issued the Certificate of Occupancy for the Encinitas Restaurant on May 15, 2002. Amended Pretrial Order, Section III, ¶ 30; TR, at p. 27, lns. 13-15; p. 27, ln. 25 – p. 28, ln. 3 (November 27, 2007).

II. Plaintiff

8. Plaintiff uses a wheelchair for mobility. Amended Pretrial Order, Section III, ¶ 39; TR, at p. 28, ln. 25 – p. 29, ln. 1; p. 29, ln. 15 – p. 30, ln. 14 (November 27, 2007).

9. Since immigrating from Italy to the United States in 1991, Plaintiff has been involved in over 100 accessibility lawsuits, as either a plaintiff or a paid plaintiff-side accessibility consultant/expert witness. TR, at p. 470, ln. 16 – p. 471, ln. 23; p. 472, ln. 25 – p. 474, ln. 25; p. 475, ln. 1

– p. 476, ln. 1; p. 477, ln. 9 – p. 484, ln. 21 (November 30, 2007).

10. Plaintiff has served as a paid plaintiff-side accessibility consultant/expert witness in over fifty accessibility cases for the law firm of Pinnock & Wakefield, a law firm specializing in plaintiff-side accessibility litigation. TR, at p. 483, ln. 24 – p. 484, ln. 4 (November 30, 2007).

11. Plaintiff has served as a paid accessibility consultant/expert witness for his counsel of record in this case in at least fifty plaintiff-side accessibility lawsuits. TR, at p. 484, lns. 5-10 (November 30, 2007).

12. Plaintiff has served as a paid accessibility consultant/expert witness for the brother of his counsel of record in this case in other plaintiff-side accessibility lawsuits. TR, at p. 484, lns. 11-16 (November 30, 2007).

13. In addition to his involvement in the above suits, Plaintiff has also personally sued at least twenty-two establishments or business[es] for alleged accessibility violations. TR, at p. 470, ln. 16 – p. 471, ln. 23; p. 472, ln. 25 – p. 474, ln. 25; p. 475, ln. 1 – p. 476, ln. 1; p. 477, ln. 9 – p. 483, ln. 18; p. 483, ln. 24 – p. 484, ln. 21 (November 30, 2007).

14. On one occasion Plaintiff spent several hours visiting a mall in the Oceanside, California area ("Oceanside Mall") for the sole purpose of looking for accessibility violations. TR, at p. 477, ln. 9 – p. 483, ln. 18 (November 30, 2007).

15. Plaintiff did not visit Oceanside Mall as a customer. He visited the Mall because the aforementioned law firm of Pinnock & Wakefield suggested that he do so. Plaintiff brought along with him, for his visit to Oceanside Mall, a measuring tape and camera to use while looking for accessibility violations. Plaintiff visited Oceanside

Mall in the hopes that the law firm would retain him as a paid accessibility consultant/expert witness in any lawsuits it would file against the Oceanside Mall for alleged accessibility violations. TR, at p. 477, ln. 9 – p. 483, ln. 18; p. 505, ln. 20 – p. 506, ln. 11 (November 30, 2007).

16. As a result of his visit to Oceanside Mall, Plaintiff agreed to be, and in fact became, a plaintiff in accessibility lawsuits that Pinnock & Wakefield filed on his behalf against at least eighteen separate business[es] that had stores at Oceanside Mall. TR, at p. 477, ln. 9 – p. 483, ln. 18; p. 505, ln. 20 – p. 506, ln. 14 (November 30, 2007).

17. Even though he had gone to Oceanside Mall for the purpose of looking for accessibility violations with the hope of being retained by Pinnock & Wakefield as a paid consultant/expert witness, Plaintiff alleged in the aforementioned lawsuits that he had suffered physical injury as a result of his visits to the establishments. TR, at p. 567, ln. 11 – p. 572, ln. 3 (November 30, 2007).

18. Neither Plaintiff nor Pinnock & Wakefield made any attempt to resolve his accessibility claims with Oceanside Mall establishments before filing the lawsuits. Plaintiff settled his suits against Oceanside Mall establishments for cash payments. He never returned to Oceanside Mall after receiving his cash settlements. TR, at p. 477, ln. 9 – p. 483, ln. 18 (November 30, 2007).

19. Plaintiff filed an accessibility lawsuit against San Diego Pier Café. He made no attempt to resolve his accessibility concerns with that restaurant before filing his lawsuit. He later settled that lawsuit for a cash payment from the defendant. He never returned to the restaurant after receiving his cash settlement. TR, at p. 470, ln. 16 – p. 471, ln. 23 (November 30, 2007).

20. Plaintiff filed two accessibility lawsuits against two Dixieline Lumber Company stores. He made no attempt to resolve his accessibility claims with Dixieline Lumber Company's corporate office before filing suit, and he settled those lawsuits for cash payments from Dixieline. TR, at p. 472, ln. 25 – p. 474, ln. 25 (November 30, 2007).

21. In one of his lawsuits against Dixieline Lumber Company, Plaintiff claimed that the store's customer service counter was too high for customers in wheelchairs. In his settlement of that case, Plaintiff agreed that it was not necessary that the store lower its counter and that it was acceptable that the store agree to provide increased customer service by way of providing additional employees to assist customers in wheelchairs. TR, at p. 463, ln. 25 – p. 465, ln. 5 (November 30, 2007)

22. Plaintiff filed an accessibility lawsuit against a Holiday Inn Hotel in downtown Los Angeles as a result of a single visit to the hotel. He made no attempt to resolve his accessibility claims with Holiday Inn's corporate management before filing suit. He settled that lawsuit for a cash payment, and he never returned to the hotel after receiving his cash settlement. TR, at p. 475, ln. 1 – p. 476, ln. 1 (November 30, 2007).

23. Plaintiff filed an accessibility lawsuit against a restaurant called "Mr. Bertrand" based on a single visit. He made no attempt to resolve his accessibility claims with that restaurant's management before filing suit. He settled that lawsuit for a cash payment, and he never returned to the restaurant after receiving his cash settlement. TR, at p. 476, ln. 9 – p. 477, ln. 8 (November 30, 2007).

24. In the instant case, Plaintiff testified at trial that he believes he should be able to see the food along the Restaurants' food serving lines in exactly the same man-

ner as those standing customers who are tall enough to see over the wall. TR, at p. 460, ln. 7 – p. 461, ln. 9 (November 30, 2007).

25. Plaintiff testified that he visited the Encinitas Restaurant on two occasions—first in February of 2005 and again during the October 6, 2006 site inspections conducted during the discovery process in this litigation. Plaintiff testified that he visited the Pacific Beach Restaurant on six occasions—once in February of 2005, once with his son, twice with his family, once with his wife, and once during the October 6, 2006 site inspections. He testified that two of these six visits were for the purpose of gathering evidence for this litigation. TR, at p. 425, ln. 24 – p. 426, ln. 11; p. 448, ln. 25 – p. 449, ln. 14 (November 30, 2007).

26. Plaintiff filed this lawsuit after only one visit to the Encinitas Restaurant and one visit to the Pacific Beach Restaurant. The remainder of Plaintiff's visits to the Restaurant[s] were made after he filed this lawsuit. TR, at p. 425, ln. 24 – p. 426, ln. 11; p. 436, lns. 5-12; p. 444, lns. 11-25 (November 30, 2007).

27. Except for his visit to the Pacific Beach Restaurant made three days before his deposition in this case, and the October 6, 2006 site-inspection conducted as part of this litigation, Plaintiff could not recall, and made no effort to record, the dates or details of the visits that he made to the Pacific Beach Restaurant after he filed this lawsuit. TR, at p. 423, ln. 15 – p. 426, ln. 11; p. 441, ln. 21 – p. 442, ln. 11; p. 447, ln. 21 – p. 449, ln. 14 (November 30, 2007).

28. Plaintiff made the second of his two visits to the Encinitas Restaurant, and at least two of his visits to the Pacific Beach Restaurant, for the purpose of gathering evidence for this lawsuit. He conducted the October 6,

2006 site inspections of the Pacific Beach and Encinitas Restaurants during the discovery process of this litigation for the purpose of gathering evidence in support of his claims; and he visited the Pacific Beach Restaurant on October 1, 2006, three days before his deposition, with the intent of repeating what he claimed were his prior bad experiences in order to prepare for his deposition and gather evidence to support his claims in this lawsuit. TR, at p. 422, ln. 21 – p. 423, ln. 14; p. 425, ln. 24 – p. 426, ln. 11; p. 442, ln. 4 – p. 443, ln. 1; p. 453, ln. 19 – p. 454, ln. 3 (November 30, 2007).

29. Plaintiff admitted at trial that on each and every occasion he visited the Pacific Beach and Encinitas Restaurants, he received a good burrito and could not identify any mistakes that had been made in his orders. TR, at p. 435, ln. 24 – p. 436, ln. 4; p. 451, ln. 24 – p. 452, ln. 22 (November 30, 2007).[3]

30. Plaintiff admitted at trial that during each and every one of his visits to the Pacific Beach and Encinitas Restaurants, Chipotle's employees were always polite and never rude to him. TR, at p. 451, lns. 12-23; p. 459, lns. 12-14 (November 30, 2007).

31. Plaintiff admitted at trial that, to his knowledge, during each and every one of his visits to the Pacific Beach and Encinitas Restaurants, his fellow customers

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[3] Plaintiff's only complaint about any of the burritos he received was that on one occasion the ingredients in his burrito were not "mixed" as well as they had been on previous occasions. Defendant asserts that its employees do not "mix" the ingredients in a burrito prior to rolling the burrito. Rather, the ingredients requested by a customer are stacked, one on top of the other, on the burrito, and the burrito is simply rolled. TR, at p. 17, ln. 2 – p. 19, ln. 7 (November 27, 2007); TR, at p. 451, ln. 24 – p. 452, ln. 22 (November 30, 2007).

were never rude to him or impatient with him. TR, at p. 453, lns. 4-10; p. 459, lns. 15-17 (November 30, 2007).

32. As with each of his previous accessibility lawsuits, Plaintiff made no attempt to resolve his accessibility claims with Defendant's corporate management before filing this lawsuit. TR, at p. 437, ln. 6 – p. 438, ln. 20 (November 20, 2007).

III. Defendant's Employees

33. Ronald Sedillo is Defendant's Direct of Training. TR, at p. 509, ln. 13 – p. 511, ln. 7 (November 30, 2007).

34. Jim Adams is Defendant's Director of Marketing. One of Mr. Adams' functions as Director of Marketing is to supervise the tracking of customer e-mail complaints made on Defendant's website. TR, at p. 252, lns. 9-20; p. 255, lns. 13-16 (November 29, 2007); TR, at p. 642, lns. 6-11 (December 3, 2007).

35. Ben Williams is currently the Area Manager for Defendant's North County stores, which includes the Encinitas Restaurant. Mr. Williams has held this position since May of 2007. Prior to this position, Mr. Williams was the General Manager of the Pacific Beach Restaurant from December of 2005 through August of 2005. TR, at p. 578, ln. 1 – p. 579, ln. 17 (November 30, 2007).

36. Matthew Cieslak is the current General Manager of Chipotle's La Jolla restaurant. Before that, he was the General Manager of the Pacific Beach Restaurant, from November of 2005 through January of 2007. Chipotle's written Customers With Disabilities Policy had not been implemented during Mr. Cieslak's tenure as the General Manger of the Pacific Beach Restaurant. As such, Mr. Cieslak did not testify about the written Customers With Disabilities Policy. Instead, Mr. Cieslak testified solely about Defendant's prior unwritten practice of providing

accommodations to customers with disabilities as part of its overarching commitment to excellent customer service. TR, at p. 35, ln. 20 – p. 36, ln. 3 (November 27, 2007); TR, at p. 221, ln. 24 – p. 222, ln. 4; p. 319, ln. 20 – p. 321, lns. 17 (November 29, 2007).

37. Maritza Arriaga is the current General Manager of the Encinitas Restaurant. She has held that position since September of 2006. TR, at p. 597, ln. 22 – p. 598, ln. 9 (December 3, 2007).

38. Kevin Kupper is the current General Manager of the Pacific Beach Restaurant. He has held that position since January of 2007. TR, at p. 622, ln. 13 – p. 623, ln. 16 (December 3, 2007).

39. Defendant's restaurant management team consists of one General Manager, an Apprentice Manager, and at least one Kitchen Manager and Service Manager. At least one of these managers is on duty at all times during business hours. TR, at p. 350, ln. 9 – p. 351, ln. 1 (November 29, 2007).

IV. The Construction of the Restaurants' Food Serving Lines

40. The Restaurants are constructed with a 44 inch high wall between the line of customers and the food preparation area (hereinafter "the Wall"). Amended Pretrial Order, Section III, ¶ 29; TR, at p. 27, lns. 10-12; p. 27, ln. 25 – p. 28, ln. 3 (November 27, 2007).

41. Transparent sneeze guards are located at the tops of the Wall and held in place by metal strips about 2 inches high. Sneeze guards are required along the food service lines at the restaurants pursuant to CURFFL Sections 114080(b)(2)(A) and 114080(c) and Health & Safety Code Section 114080. Amended Pretrial Order,

Section III, ¶ 32; TR, at p. 27, lns. 19-24; p. 27, ln. 25 – p. 28, ln. 3 (November 27, 2007).

42. The top of the metal strip that holds the sneeze guard in place above the Wall is approximately 46 inches from the finished floor. Amended Pretrial Order, Section III, ¶ 33; TR, at p. 28, lns. 4-6; p. 29, ln. 15 – p. 30, ln. 14 (November 27, 2007).

43. The food preparation counters, on the side of the Wall where the food crew works, are approximately 34-35 inches from the finished floor. Amended Pretrial Order, Section III, ¶ 34; TR, at p. 28, lns. 6-8; p. 29, ln. 15 – p. 30, ln. 14 (November 27, 2007).

44. A portion of the food preparation counter, approximately four feet in length, extends beyond the Wall and is completely unobstructed. That portion of the counter consists of the expo station[4] and the cash register station, and meets the requirements of the ADAAG. Amended Pretrial Order, Section III, ¶ 51; TR, at p. 31, lns. 24-25; p. 32, lns. 1-4 (November 27, 2007); TR, at p. 219, lns. 7-15 (November 29, 2007).

V. The View for People in Wheelchairs

45. The average eye level of persons in wheelchairs is between 43 and 51 inches from the finished floor. [Stip. Fact No. 35.]

46. If a person's eyes are at a height of 51 inches, and are 12 inches from the wall at the food service line, the person can see no portion of the food service counter, the

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[4] The expo station is a portion of empty space on the counter where the cash register is located between the salsa station and the cash register. The expo station is approximately 2½ to 3 feet in width. TR, at p. 172, lns. 17-19 (November 27, 2007); TR, at p. 219, lns. 7-15 (November 29, 2007).

food items available for selection, or the preparation of their food. [Stip. Fact No. 37.]

47. If a person's eyes are at a height of 43 inches and are 12 inches from the wall at the food service line, the person can see no portion of the food service counter, the food items available for selection, or the preparation of their food. [Stip. Fact No. 38.]

VI. The Ordering Process at Defendant's Restaurants

48. Customers who order their food in the Restaurants place their food orders in the Restaurants' food service line. The food service line consists of several stations. The first station is the tortilla station, where the customer is asked which type of entrée he or she would like (a burrito, burrito bol, or tacos). Amended Pretrial Order, Section III, ¶ 13; TR, at p. 17, lns. 2-6; p. 17, ln. 24 – p. 19, ln. 7 (November 27, 2007).

49. If a customer selects a burrito, the tortilla is warmed at the tortilla station and then sent to the hot well table where the selected ingredients are placed on the tortilla. Amended Pretrial Order. Section III, ¶ 14; TR, at p. 17, lns. 2-9; p. 17, ln. 24 – p. 19, ln. 7 (November 27, 2007).

50. The tortilla is then sent to the salsa station where additional items are placed on it and the burrito is then folded and wrapped. The salsa station includes salsa, guacamole, cheese and lettuce. Amended Pretrial Order, Section III, ¶ 15; TR, at p. 17, lns. 11-13; p. 17, ln. 24 – p. 19, ln. 7 (November 27, 2007).

51. The customer finally proceeds to the cash register, where he or she pays for his or her order. Amended Pretrial Order, Section III, ¶ 15; TR, at p. 17, lns. 11-13; p. 17, ln. 24 – p. 19, ln. 7 (November 27, 2007).

52. Defendant's employees provide customers, particularly first-time customers, with in-depth explanations of each of the items available on the menu. TR, at p. 204, ln. 18 – p. 205, ln. 18 (November 29, 2007).

53. It is common for customers to look up at the menu boards in the course of selecting and customizing their entrées. TR, at p. 203, ln. 22 – p. 204, ln. 2 (November 29, 2007).

54. Customers make their food selections by looking at the large menu boards hung above the food preparation counters at the Restaurants and communicating with the crew employees. The menu boards describe the entrées and ingredients available at the Restaurants. TR, at p. 92, ln. 20 – p. 93, ln. 20 (November 27, 2007); TR, at p. 204, ln. 18 – p. 205, ln. 18; p. 207, lns. 2-12; p. 247, ln. 21 – p. 248, ln. 5 (November 29, 2007); Ex. 13, at pp. T-1-T-5.

55. Printed menus containing descriptions of the entrées and food ingredients are also available for customers to use in selecting their entrées. TR, at p. 222, lns. 5-19 (November 29, 2007); TR, at p. 450, lns. 8-17 (November 30, 2007); TR, at p. 600, ln. 13 – p. 601, ln. 15 (December 3, 2007).

56. Defendant's employees are trained to take any steps necessary to ensure that each and every customer's experience meets with the desires and needs he or she expresses to the crew members and that the experience is 100% enjoyable. TR, at p. 211, lns. 1-16 (November 29, 2007); TR, at p. 576, lns. 6-25 (November 30, 2007).

57. Defendant understands that people "eat with their eyes." TR, at p. 117, lns. 21-23, Ex. 1, p. 10-1666 (November 29, 2007).

58. Some people are visual eaters and if the food looks good, they will want to eat it. TR, at p. 112, lns. 6-11 (November 29, 2007).

59. In order to ascertain whether a customer may require special assistance with the ordering process, Chipotle employees are trained to look for and read customers' oral communications and non-oral cues, the latter of which includes "body language" and customers who look confused, customers who intently study the menu board, or customers who are craning their neck to see behind the food serving counter. TR, at p. 217, lns. 9-16 (November 29. 2007); TR, at 531, ln. 24 – p. 532, ln. 12; p. 533, ln. 9 – p. 534, ln. 10 (November 30, 2007); TR, at p. 600, ln. 13 – p. 601, ln. 15; p. 618, lns. 12-15; p. 636, ln. 22 – p. 637, ln. 8 (December 3, 2007).

60. Some customers do not want to have food ingredients described to them or to interact with the Defendant's employees behind the food service counter. In such cases, the Defendant's employees act in accordance with the customer's wishes. TR, at p. 538, ln. 19 – p. 539, ln. 25 (November 30, 2007).

61. Defendant's employees are trained to orally repeat each food ingredient requested by the customer as the customer proceeds down the food service line in order to ensure that the correct ingredients are placed on the customer's order and that no mistakes are made. TR, at p. 207, lns. 2-12 (November 29, 2007).

62. If at any point a customer believes that a mistake has been made in the preparation of his or her entrée, Defendant will prepare a new entrée for the customer free of charge upon request. TR, at p. 206, ln. 16 – p. 207, ln. 1 (November 29, 2007).

63. Not all standing customers at the Restaurants order their food in the same way. TR, at p. 204, lns. 3-5 (November 29, 2007).

64. Not all standing customers at the Restaurants are tall enough to see over the Wall. Those customers cannot see the food ingredients in the pans behind the Wall, unless some accommodation is provided. TR, at p. 204, lns. 6-17 (November 29, 2007).

65. Defendant has always made accommodations for all customers—including customers in wheelchairs and non-disabled standing customers who are not tall enough to see over the Wall—who indicate, either through oral or non-oral cues, a desire to see the food ingredients on the food preparation counters or to see their entrées being made. Those accommodations include describing the food ingredients to the customer, showing the customer samples of food ingredients in serving spoons or portion cups, or assembling the customer's entrée at the expo station or at a table in the seating area. TR, at p. 216, lns. 5-22; p. 217, lns. 9 – p. 218, ln. 19; p. 219, ln. 20 – p. 220, ln. 6 (November 29, 2007); TR, at p. 542, ln. 8 – p. 543, ln. 3; p. 584, ln. 14 – p. 585, ln. 7 (November 30, 2007); TR, at p. 599, ln. 19 – p. 604, ln. 12; p. 618, lns. 12-15 (December 3, 2007).

66. Defendant has determined that the temperature of the food, along with the appearance and color of the food, affects the flavor of the food. The food is required to be served "hot from the grill." TR, at p. 117, lns. 2-5; Ex. 1, p. 10-1700.

67. The ingredients of a burrito do not lose their freshness or heat if they are brought to a customer at a table in the seating area. TR, at p. 540, lns 7-16 (November 30, 2007).

68. The Restaurants possess a stock of four ounce portion cups that can be used to display or sample food ingredients for customers. Those potion cups hold Chipotle's standard serving size of four ounces for each ingredient. TR, at p. 36, lns. 11-18; p. 177, lns. 13-18 (November 27, 2007).[5]

69. Standing customers who can see over the Wall are only able to see the top layer of the food in the pan. TR, at p. 462, ln. 17 – p. 463, ln. 4 (November 29, 2007).

70. Throughput is a measure of how quickly customers can proceed through the food serving lines at Chipotle's restaurants. Throughput is measured differently at each Chipotle restaurant. While the starting point for tracking throughput may vary, the end point is always the moment at which a customer completes his or her transaction at the cash register. TR, at p. 208, lns. 12-15; p. 315, lns. 11-17; p. 329, ln. 11 – p. 331, ln. 8 (November 29, 2007).

71. Considerations of throughput are secondary to ensuring that each customer receives outstanding personalized service. Any conflict[s] between throughput and excellent customer service are resolved in favor of affording each customer personalized attention to his or her needs or desires. TR, at p. 211, ln. 1 – p. 213, ln. 7; p. 330, ln. 13 – p. 330, ln. 22 (November 29, 2007).

72. During Matthew Cieslak's tenure as General Manager of the Pacific Beach Restaurant, the average time at that Restaurant for a customer to proceed from the tortilla station (at the start of the food service line) through the cash register station (at the end of the food

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[5] For a period of time the serving size for rice was 5 ounces. That serving size has been reduced to 4 ounces. TR, at p. 108, lns. 5-13; p. 177, ln. 19 – p. 178, ln. 8.

service line) was approximately two minutes. TR, at p. 208, ln. 16 – p. 209, ln. 2 (November 29, 2007).

73. Customers with multiple orders, children, or special requests, or first-time customers, frequently take longer than two minutes to proceed from the tortilla station to the cash register station. Serving a first-time customer can take up to ten minutes. TR, at p. 209, lns. 5-22; p. 345, ln. 15 – p. 346, ln. 3 (November 29, 2007).

74. Defendant has always trained its restaurant employees to identify first-time customers, and to accommodate them by asking them if they would like to have Chipotle's menu, food ingredients, and food preparation process described to them, if they would like to sample the food, or some combination of those options. TR, at p. 303, lns. 13-25 (November 29, 2007).

75. Accommodating first-time customers can require Chipotle employees to spend more time assisting those customers than is typically necessary to serve regular customers. TR, at p. 303, lns. 13-25 (November 29, 2007).

76. A customer who requests to have his or her entrée assembled at the expo station will not impede other customers from ordering or paying for their food, because those other customers are allowed and physically able to proceed past the customer who is having his or her entrée assembled at the expo station directly to the cash registers. TR, at p. 218, ln. 20 – p. 219, ln. 19 (November 29, 2007).

77. The cash station is one of the slowest parts of the food service line. Therefore, a customer who requires above-average time to proceed from the tortilla station through the salsa station on the food serving line will not necessarily adversely affect the time that it takes the

customers behind him or her to proceed through the line. TR, at p. 341, ln. 22 – p. 342, ln. 14 (November 29, 2007).

78. At Chipotle the appearance of the food in the serving pans behind the Wall has always been of secondary importance to the appearance of the food once it has been prepared and served to the customer. TR, at p. 203, lns. 13-18 (November 29. 2007).

79. The most important aspect of the Chipotle experience is the experience of eating and enjoying one's food. TR, at p. 641, lns. 14-21 (December 3, 2007).

VII. Chipotle's Culture and Philosophy of Customer Service

80. Historically, the culture and philosophy of Chipotle has been to pass on internal information regarding the company's policies and practices orally and not in writing. TR, at p. 520, ln. 25 – p. 522, ln. 5 (November 30, 2007).

81. The "WOW Factor" is a term that Chipotle has coined to describe its policy of going above and beyond its customers' expectations with respect to customer service. Examples of applications of the "WOW Factor" include, but are not limited to, purchasing a customer's food if he or she has lost or forgotten his or her wallet, offering to buy food for a regular customer's colleagues, calling a tow truck if a customer is experiencing difficulties with his or her car, visiting a customer at a table to check on him or her after he or she has purchased an entrée, offering samples of the food ingredients, and helping a customer to his or her table. TR, at p. 213, ln. 24 – p. 215, ln. 10 (November 29, 2007).

82. All of Defendant's employees are trained on its policy of exceeding customers' expectations with respect to customer service. That training consists of the mate-

rials in Chipotle's management guide "The Know" and personal instruction from one Chipotle employee to another. TR, at p. 215, ln. 11-24; TR, at p. 333, ln. 2 – p. 335, ln. 11 (November 29, 2007).

83. "The Know" is a reference guide for Chipotle's restaurant managers. It contains all of the information that Chipotle's managers are required to know, including information regarding the company's policies and practices. TR, at p. 520, ln. 25 – p. 522, ln. 5 (November 30, 2007).

84. One method by which Chipotle's policies and practices are conveyed to its employees is through the restaurant General Manager's pre- and post-shift meetings with his or her managers and crew members. TR, at p. 522, ln. 6 – p. 523, ln. 8 (November 30, 2007).

85. A significant aspect of Chipotle's employee training consists of "shoulder-to-shoulder" training, in which restaurant employees teach and learn from one another about Chipotle's practices and policies, both written and unwritten, by working in close proximity with one another and observing one another. TR, at p. 333, ln. 13 – p. 334, ln. 8 (November 29, 2007).

VIII. Chipotle's Previous Practice of Accommodating All Customers

86. At all times prior to the implementation of the written Customers with Disabilities Policy in the spring of 2007, Defendant maintained a philosophy and practice of accommodating any customer—including, but not limited to, customers in wheelchairs—who wanted to see the available food ingredients or watch the preparation of their food. That practice included a requirement that employees of the Restaurants show customers in wheelchairs samples of the food ingredients in serving spoons or portion cups, or assemble the customer's food at the

expo station or at a table in the Restaurants' seating areas. This practice of accommodating customers with disabilities has always been part of the Company's overall commitment to providing excellent customer service, commonly referred to within Chipotle as "the WOW Factor." TR, at p. 196, lns. 8-12; p. 215, ln. 25 – p. 216, ln. 22; p. 327, ln. 7 – p. 328, ln. 15; p. 335, lns. 12-16 (November 29, 2007; TR, at p. 530, lns. 22-24; p. 576, lns. 6-25 (November 30, 2007); TR, at p. 599, ln. 19 – p. 603, ln. 22 (December 3, 2007).

87. Under this practice, Chipotle's restaurant employees have always been trained to look for non-oral cues from a customer, such as confused looks or intense review of the menu boards or printed menus, as potential requests for assistance, and, based on such non-oral cues, to offer to accommodate that customer. TR, at p. 217, ln. 9 – [] p. 218, ln. 19 (November 29, 2007); TR, at p. 531, ln. 24 – p. 532, ln. 12; p. 533, ln. 9 – p. 534, ln. 10 (November 30, 2007); TR, at p. 600, ln. 13 – p. 601, ln. 15; p. 618, ln. 12-15 (December 3, 2007).

88. Ron Sedillo was first instructed on Chipotle's practice of accommodating customers with disabilities when he was being trained as a restaurant General Manager in 1998. TR, at p. 332, ln. 17 – p. 333, ln. 12; p. 335, ln. 12 – p. 336, ln. 4 (November 29, 2007); TR, at p. 509, ln. 20 – p. 511, ln. 7 (November 30, 2007).

89. Ron Sedillo has served customers in wheelchairs by preparing a burrito at a table in the restaurant's seating area, and has, on more than one occasion, witnessed other Chipotle employees preparing burritos for wheelchair users at tables in the restaurant's seating area. TR, at p. 336, ln. 5 – p. 337, ln. 16; p. 343, lns. 14-20 (November 29, 2007).

90. During the period in which Ben Williams was employed as the General Manager of the Pacific Beach Restaurant, he understood that Chipotle's philosophy and practice of going above and beyond its customers' expectations with respect to customer service required him and his employees to accommodate customers with disabilities, including customers in wheelchairs, who required or who otherwise appeared to need assistance in placing their orders. He understood that customer service philosophy and practice to require that his employees raise samples of food ingredients, or assemble a customer's entrée at the expo station or at a table in the restaurant's seating area. TR, at p. 583, ln. 14 – p. 585, ln. 7 (November 30, 2007).

91. During the period in which Matthew Cieslak was employed as the General Manager of the Pacific Beach Restaurant, he understood that as part of the "Wow Factor" he and his employees were required to accommodate customers with disabilities, including customers in wheelchairs, who requested or otherwise appeared to need assistance in placing their orders. He understood Chipotle's customer service philosophy and practice to require that he and his employees raise samples of food ingredients, tilt the pans containing the food ingredients to allow customers to see the contents of the pans, or assemble a customer's entrée at the expo station or at a table in the restaurant's seating area. TR, at p. 215, ln. 25 – p. 216, ln. 22; p. 217, lns. 9-16 (November 29, 2007).

92. The aforementioned accommodations have always been available to all customers who are not tall enough to see over the Wall and who indicate, either orally or through non-oral cues, a desire to see the food ingredients on the foot preparation counters. TR, at p. 217, ln. 9

– p. 218, ln. 19; p. 219, ln. 20 – p. 220, ln. 6 (November 29, 2007).

93. Matthew Cieslak provided such accommodations, and witnessed other employees providing such accommodations, to customers at the Pacific Beach Restaurant during his tenure as the General Manager of that restaurant. TR, at p. 217, ln. 21 – p. 218, ln. 19 (November 29, 2007).

94. Matthew Cieslak personally served a customer in a wheelchair on several occasions while he was the General Manager of the Pacific Beach Restaurant. He asked the customer if there was any assistance he could provide him, and the customer declined assistance because the customer knew exactly what he wanted. The customer was able to proceed through the food service line as quickly and easily as standing customers who could see over the Wall at the restaurant. TR, at p. 220, ln. 8 – p. 221, ln. 2; p. 245, ln. 20 – p. 246, ln. 4; p. 247, lns. 12-20 (November 29, 2007).

95. During his tenure as the General Manager of the Pacific Beach Restaurant Matthew Cieslak never received any complaints from any customers in wheelchairs stating that they could not see the food ingredients or that they could not see their entrées being assembled. TR, at p. 221, lns. 9-23 (November 29, 2007).

96. During his tenure as General Manager of the Pacific Beach Restaurant, Matthew Cieslak was responsible for training the employees of that restaurant. TR, at p. 37, lns. 16-18 (November 27, 2007).

97. As General Manager of the Pacific Beach Restaurant, Matthew Cieslak trained the restaurant's employees in Chipotle's general policy of excellent customer service. TR, at p. 213, ln. 21-23 (November 27, 2007).

98. As General Manager of the Encinitas Restaurant, Maritza Arriaga has applied Chipotle's general policy of providing excellent customer service to customers with disabilities. On one occasion, Ms. Arriaga served two elderly women who entered her store using walkers. Ms. Arriaga noticed that the women had sat down at a table without entering the food service line. Ms. Arriaga approached the women, introduced herself, provided them with written menus and described the food to them in detail. The women asked Ms. Arriaga to place their orders for them. She did so, and promptly brought the orders to their table. The women appeared to Ms. Arriaga to be pleased with the service they had received. TR, at p. 600, ln. 13 – p. 601, ln. 15 (December 3, 2007).

99. Even before the implementation of the written Customers With Disabilities Policy, Chipotle's managers and employees were evaluated on their adherence to the company's culture, philosophy and practice of providing excellent customer service, which, as set forth above, included a general requirement to accommodate customers with disabilities or customers with special needs. TR, at p. 528, lns. 15-25 (November 30, 2007).

100. Defendant has never received any complaint from any customer in a wheelchair at the Restaurants (other than Plaintiff's lawsuit). TR, at p. 642, ln. 6 – p. 643, ln. 7 (December 3, 2007).

IX. Chipotle's Written Customers with Disabilities Policy

101. In February of 2007, Chipotle implemented a nationwide "Customers With Disabilities Policy" setting forth in writing methods to continue providing excellent customer service to all its customers, including customers with disabilities. The written policy was intended to improve Defendant's customer service to disabled custom-

ers by giving its managers and employees clearer directions with respect to the service of customers with disabilities in particular. TR, at p. 319, ln. 20 – p. 321, ln. 17 (November 29, 2007); TR, at p. 524, ln. 9 – p. 525, ln. 12; p. 534, lns. 11-20 (November 30, 2007).

102. Between February and May of 2007, Chipotle conducted a nationwide rollout of the Customers With Disabilities Policy, which included training at the restaurant level and at the two Restaurants that are the subject of this case. TR, at p. 525, ln. 25 – p. 528, ln. 3; p. 575, ln. 16 – p. 576, ln. 5; p. 581, ln. 20 – p. 583, ln. 9; p. 592, lns. 3-25 (November 30, 2007); TR, at p. 599, lns. 7-18; p. 605, ln. 18 – p. 606, ln. 22; p. 624, lns. 13-23; TR, at p. 626, lns. 10-19 (December 3, 2007).

103. In early February 2007, Chipotle disseminated the Customers With Disabilities Policy to its Human Resources Training Directors, who supervise the training of Chipotle's employees in the field, and its Operations Directors, who oversee each of the markets in which the restaurant has presence. Each of Chipotle's Human Resources Training Directors and Operations Directors was fully familiarized with the Customers With Disabilities Policy. On or about February 26, 2007, Chipotle provided a written copy of the Customers With Disabilities Policy to each of its Regional Directors, Operations Directors, and Human Resources Training Directors by electronic mail. Ronald Sedillo then began attending Regional Meetings and Operations Meetings around the country where he discussed with Chipotle's Area Managers, Regional Staff, Operations Directors and Human Resources Training Directors, the Customers With Disabilities Policy, its importance, and the proper manner in which it was to be carried out. The Operations Directors, in turn, ensured that the Area Managers were thoroughly famil-

iarized with the policy, and the Area Managers, in turn, ensured that Chipotle's General Managers were fully trained in the policy. The General Managers then ensured that their management teams and crew members fully understood the policy. Finally, the Customers With Disabilities Policy was officially incorporated into the Know. TR, at p. 525, ln. 25 – p. 527, ln. 20; p. 581, ln. 20 – p. 583, ln. 9 (November 30, 2007); TR, p. 599, lns. 7-99 (December 3, 2007).

104. As part of the training on the Customers With Disabilities Policy that was rolled out to the employees of the Encinitas Restaurant, Ben Williams held an Area patch meeting in May of 2007 at which Mr. Williams discussed the Customers With Disabilities Policy in detail with all of the General Managers and Apprentice Managers within his Area—including Maritza Arriaga. During the patch meeting, Mr. Williams had his managers act out role playing scenarios involving customers with disabilities to illustrate how the new policy regarding the accommodation of customers with disabilities should [be] implemented. TR, at p. 578, lns. 1-25 (November 30, 2007); TR, p. 592, ln. 3-25 (December 3, 2007).

105. Ms. Arriaga, the current General Manager of the Encinitas Restaurant, was informed of the written Customers With Disabilities Policy by e-mail in April of 2007, and subsequently attended the May 2007 Area patch meeting that Ben Williams held. Ms. Arriaga subsequently trained the managers and crew members in the Encinitas Restaurant on the Customers With Disabilities Policy by orally reviewing the policy, and providing examples of the policy in practice. Some of this training took place in meetings Ms. Arriaga held with her staff in between their shifts. TR, at p. 578, lns. 1-25 (November

30, 2007); TR, p. 592, lns. 3-25; p. 599, lns. 9-18; p. 605, ln. 18 – p. 606, ln. 22 (December 3, 2005).

106. Kevin Kupper, the current General Manager of the Pacific Beach Restaurant, was instructed on how to carry out the Customers With Disabilities Policy by his Area Manager in a patch meeting in May of 2007. TR, at p. 624, ln. 13-23 (December 3, 2007).

107. Kevin Kupper trained his employees in the Pacific Beach Restaurant on the Customers With Disabilities Policy by, among other things, discussing the policy with his managers and crew members before the start of their shifts. TR, at p. 527, ln. 21 – p. 528, ln. 3 (November 30, 2007); TR, at p. 636, lns. 10-19 (December 3, 2007).

108. New managers that come up through the ranks of Chipotle's employees are trained on the Customers With Disabilities Policy by their senior managers. Restaurant managers who join Chipotle from outside the company receive training on the Customers With Disabilities Policy during their orientation. TR, at p. 575, ln. 16 – p. 576, ln. 5 (November 30, 2007).

109. Defendant ensures that its employees adhere to the Customers With Disabilities Policy through the company's employee review process. Defendant's restaurant crew members are evaluated twice a year. Defendant's restaurant managers are reviewed quarterly (and are eligible for a raise one review period each year). During each review process, the Area Managers and Operations Directors responsible for supervising the restaurant managers and employees in the geographic areas under their supervision review all aspects of a restaurant's performance including its employees' adherence to Chipotle's policies. TR, at p. 5234, ln. 9 – p. 524, ln. 8; p. 528; lns. 4-14 (November 30, 2007); Ex. 10.

110. Defendant's Customers With Disabilities Policy provides as follows:

> Excellent customer service is of paramount importance at every Chipotle restaurant at all times. A customer with a disability (for example, a visual or mobility impairment) may benefit from some alternative means of presenting or describing our food. In all such cases the restaurant staff will offer a suitable accommodation based on the individual circumstances, and will be responsive to the customer's requests. Depending on the circumstances, our crew member or manager may ask the customer if we can accommodate them during their visit. Examples of some of the ways we accommodate individuals include:
>
> 1. Samples of the food can be placed in soufflé cups and shown or handed to the customer.
> 2. Some customers may prefer an opportunity to see or even sample the food at a table.
> 3. Customers may simply wish to have the food or food preparation process described to them.
> 4. Or combinations of the above accommodations with any other reasonable accommodation requested or appropriate for the individual.
>
> The point of good customer service is that it has to be personalized. It is the manager and crew's responsibility to ensure that the experience a customer with a disability has is excellent.
>
> Consideration of throughput, productivity or efficiency are secondary to ensuring a positive experience for disabled customers. Crew members are encouraged to inform their Restaurant Manager regarding the experiences of their disabled

customers and such experiences will be considered during the performance review process, both for the crew member and the manager.

The above example details a scenario involving only a visual or mobility impaired customer. Other disabilities may exist among our customers and it is our policy at Chipotle to make good faith, reasonable accommodations for all of our disabled customers. This practice is consistent with our goal of providing excellent customer service to all of our customers. TR, at p. 525, lns. 13-24; p. 529, ln. 1 – p. 530, ln. 20 (November 30, 2007); Ex. 10.

111. Under the Customers With Disabilities Policy, the manager on duty at the Restaurants (who can be a General Manager, Apprentice Manager, or Service Manager) is responsible for greeting any customer with a disability, whom the manager does not recognize to be a regular customer, at the tortilla station and determining what, if any, accommodation[ ] is required. The manager on duty first inquires if the customer has been to a Chipotle restaurant before. If the customer responds that he or she has been to a Chipotle restaurant before, the manager on duty is required to inform the customer to "let me know if I can help you or if you need anything." If the customer responds that he or she has not been to [a] Chipotle restaurant before, the manager on duty is required to inform the customer of the accommodations available to him or her. Specifically, the manager on duty must affirmatively inform the customer that the manager can describe the menu in detail to the customer, show the food to the customer, have the customer sample the food, take the food ingredients to the expo station and assemble the customer's entrée there, take the food ingredients to a table in the dining area and assemble the customer's

entrée there, or a combination of any of those accommodations. TR, at p. 319, ln. 20 – p. 321, ln. 3; p. 349, lns. 4-18; p. 350, ln. 9 – p. 351, ln. 1 (November 29, 2007); TR, at p. 580, ln. 16 – p. 581, ln. 19 (November 30, 2007); TR, at p. 598, ln. 14 – p. 599, ln. 8; TR, at p. 623, ln. 17 – p. 624, ln. 12; p. 624, ln. 24 – p. 625, ln. 19 (December 3, 2007).

112. The written Customers With Disabilities Policy did not change the substantive accommodations available to Chipotle's customers, all of which have always been available to both able-bodied and disabled customers alike. Rather, the written Customers With Disabilities Policy focused and clarified Chipotle's prior accommodations practices to customers with disabilities in particular. It also imposed two new requirements with respect to the process of applying those preexisting accommodations to customers with disabilities in particular. First, it established that it is the responsibility of the manager on duty at the restaurant, rather than his or her crew members, to carry out the policy (by requiring the manager on duty to greet a customer with a disability and inquire as to whether he or she desires any accommodations as soon as he or she approaches the tortilla station in the food serving line). Second, it established that the manager on duty must affirmatively inform the customer with a disability of the various accommodations options without waiting for the customer to request them. TR, at p. 337, ln. 25 – p. 338, ln. 11; p. 339, ln. 6 – p. 340, ln. 9 (November 29, 2007); TR, at p. 585, lns. 16-24 (November 30, 2007); TR, at p. 603, ln. 23 – p. 604, ln. 12 (December 3, 2007).

113. Where a manager identifies a customer with a disability as a regular customer of the restaurant and where that customer, through oral or non-oral cues, has previously indicated whether and how he or she wants to

be accommodated, the manager will attend to that customer based on his or her previously indicated preferences. TR, at p. 340, ln. 10 – p. 341, ln. 21 (November 29, 2007); TR, at p. 621, lns. 9-19; TR, at p. 625, ln. 20 – p. 626, ln. 9; p. 627, ln. 19 – p. 628, ln. 4; p. 636, ln. 22 – p. 637, ln. 12 (December 3, 2007).

114. For example, if on previous visits a regular customer with a disability has indicated that he or she wanted to have food shown to him or her, the manager on duty will offer to show him or her food ingredients on future visits. TR, at p. 304, lns. 14-25 (November 29, 2007).

115. However, even if a regular customer with a disability has declined accommodations on previous visits, if on a future visit he or she provides any non-oral cues that he or she may want to see the food ingredients, such as craning his or her neck while in the food service line, the manager on duty will observe those cues and offer to accommodate the customer at that time. TR, at p. 636, ln. 22 – p. 637, ln. 12 (December 3, 2007).

116. Since the creation of the Customers With Disabilities Policy, Maritza Arriaga has witnessed her Apprentice Manager apply it on at least one occasion at the Encinitas Restaurant. Specifically, Ms. Arriaga witnessed a recent incident in which her Apprentice Manager immediately greeted a customer in a wheelchair who entered the Encinitas Restaurant and asked him if he had ever been to a Chipotle restaurant before. Based on Ms. Arriaga's observation, the customer appeared to be familiar with Chipotle's restaurants and appeared to decline her Apprentice's offer of assistance. Based on Ms. Arriaga's continued observation, the customer did not appear confused or frustrated at any point as he proceeded through the food serving line. TR, at p. 604, ln. 13

– p. 605, ln. 10; p. 607, ln. 25 – p. 609, ln. 3 (December 3, 2007).

117. Kevin Kupper, as General Manager of the Pacific Beach Restaurant, has personally served at least one customer in a wheelchair at the Pacific Beach Restaurant since the implementation of the Customers With Disabilities Policy. Mr. Kupper first served that customer immediately before Chipotle disseminated the Customers With Disabilities Policy. Even under the prior practice of accommodating customers with special needs, Mr. Kupper took the initiative to greet that customer and ask him if there was any way he could be of assistance. That particular customer responded that he was not interested in any accommodations, and proceeded quickly through the food service line. In his subsequent visits to the Pacific Beach Restaurant, including his visits to the restaurant since the creation of the written Customers With Disabilities Policy, that customer has never indicated, either orally or through non-oral cues, that he desired to see samples of the food or desired any other accommodations. TR, at p. 626, ln. 20 – p. 628, ln. 4; p. 635, ln. 23 – p. 636, ln. 14 (December 3, 2007).

118. Since implementing the new written Customers With Disabilities Policy, Chipotle has not received any complaints from any customer in a wheelchair regarding the accessibility of the Pacific Beach or Encinitas Restaurants. TR, at p. 463, ln. 25 – p. 465, ln. 5 (November 30, 2007); TR, at p. 593, ln. 1-20; p. 642, ln. 6 – p. 643, ln. 10; TR, at p. 606, ln. 23 – p. 607, ln. 24; p. 628, lns. 5-24 (December 3, 2007).

X. Plaintiff's Visits to the Restaurants

119. Although the Pacific Beach Restaurant is within walking distance of his house, Plaintiff has not visited

that restaurant since October 6, 2006. TR, at p. 422, lns. 17-20; p. 425, ln. 24 – p. 426, ln. 11 (November 30, 2007).

120. Plaintiff has not visited either of the Restaurants since the written Customers With Disabilities Policy was implemented. TR, at p. 321, lns. 4-17; p. 376, lns. 19-21 (November 29, 2007); TR, at p. 422, ln. 21 – p. 423, ln. 7; p. 425, ln. 24 – p. 426, ln. 11 (November 30, 2007).

121. Plaintiff admitted at trial that, with respect to each and every visit that he made to the Encinitas and Pacific Beach Restaurants, he enjoyed the entrée he received and found nothing wrong with his order. TR, at p. 435, ln. 24 – p. 436, ln. 4; p. 451, ln. 24 – p. 452, ln. 22 (November 30, 2007).

122. Plaintiff admitted at trial that during each and every one of his visits to the Pacific Beach and Encinitas Restaurants, Chipotle's employees were polite and never rude to him. TR, at p. 451, lns. 12-23; p. 459, lns. 12-14 (November 30, 2007).

123. Plaintiff admitted at trial that, to his knowledge, during each and every one of his visits to the Pacific Beach and Encinitas Restaurants, his fellow customers were never rude to or impatient with him. TR, at p. 453, lns. 4-10; p. 459, lns. 15-17 (November 30, 2007).

124. Plaintiff testified that he visited the Encinitas Restaurant on two occasions, and that one of those two visits was the October 6, 2006 site inspection conducted in connection with this litigation. TR, at p. 425, ln. 24 – p. 426, ln. 11 (November 30, 2007).

125. Plaintiff testified that he first visited the Encinitas Restaurant in February of 2005. He testified that he was accompanied on this first visit by his son, who, although not disabled, could not see over the Wall without accommodation. Plaintiff admitted at trial that he under-

stood how to use the menu board at the Encinitas Restaurant, and used it to place his and his son's orders. TR, at p. 433, lns. 5-22 (November 30, 2007).

126. During his February 2005 visit to the Encinitas Restaurant, Plaintiff did not review any of the printed menus that were available to him in the restaurant. TR, at p. 450, lns. 4-19 (November 30, 2007).

127. During his first visit to the Encinitas Restaurant, Plaintiff did not ask any Chipotle employee to show him any samples of the food ingredients. TR, at p. 435, lns. 1-3 (November 30, 2007).

128. Plaintiff's February 2005 visit to the Encinitas Restaurant was his only visit to that Restaurant either before or after filing this lawsuit (except for his site inspection). TR, at p. 425, ln. 24 – p. 426, ln. 11 (November 30, 2007).

129. Plaintiff testified that he first visited the Pacific Beach Restaurant in February of 2005, approximately one week after his first visit to the Encinitas Restaurant. TR, at p. 436, lns. 5-8 (November 30, 2007).

130. Plaintiff admitted at trial that he returned to the Pacific Beach Restaurant three days before his deposition in order to repeat what he claims was a "bad experience." Plaintiff admitted that the purpose of that visit was to prepare for his deposition and gather information for his claims against Chipotle. TR, at p. 442, ln. 4 – p. 443, ln. 1; p. 453, ln. 19 – p. 454, ln. 3 (November 30, 2007).

131. Plaintiff's most recent visit to the Pacific Beach Restaurant was the October 6, 2006 site inspection of that Restaurant. TR, at p. 376, lns. 19-21 (November 29, 2007); TR, at p. 422, ln. 21 – p. 423, ln. 7; p. 425, ln. 24 – p. 426, ln. 11 (November 30, 2007).

132. During the Pacific Beach Restaurant site inspection, Plaintiff was shown each of the food ingredients he requested to see as he moved down the food service line. TR, at p. 376, ln. 19 – p. 377, ln. 5 (November 29, 2007); TR, at p. 455, ln. 23 – p. 456, ln. 3; p. 459, lns. 6-11 (November 30, 2007).

133. During the Pacific Beach Restaurant site inspection Plaintiff did not request to see the food in the pans behind the Wall or to have his entrée prepared at the expo station or at a dinning table. TR, at p. 457, ln. 21 – p. 458, ln. 5 (November 30, 2007).

134. Plaintiff's most recent visit to the Encinitas Restaurant was the October 6, 2006 site inspection of that restaurant conducted by Plaintiff during the discovery process in this litigation. TR, at p. 376, lns. 19-21 (November 29, 2007); TR, at p. 422, ln. 21 – p. 423, ln. 7 (November 30, 2007).

135. During the Encinitas Restaurant site inspection, Plaintiff was shown each of the food ingredients he requested to see as he moved down the food service line by the restaurant's General Manager, Maritza Arriaga. TR, at p. 376, ln. 19 – p. 377, ln. 5 (November 29, 2007); TR, at p. 455, ln. 23 – p. 456, ln. 3; p. 459, lns. 6-11 (November 30, 2007); TR, at p. 601, ln. 24 – p. 603, ln. 22 (December 3, 2007).

136. During the Encinitas Restaurant site inspection, as Ms. Arriaga held up samples of the food ingredients for Plaintiff to see, she described each ingredient and asked Plaintiff if the items she showed him were acceptable. Plaintiff indicated yes or no to each item, and indicated to Ms. Arriaga, through both oral communications and non-oral cues, that the accommodations she had provided to him were acceptable. Indeed, Plaintiff indicated to Ms. Arriaga that he was satisfied with the service he

had received. TR, at p. 601, ln. 24 – p. 603, ln. 22 (December 3, 2007); Ex. 6.

137. During the site inspection of the Encinitas Restaurant, Ms. Arriaga showed Plaintiff the exact portions of each ingredient that she was placing into his burrito before placing the ingredient in the burrito. Plaintiff did not indicate that he wanted more or less of any of the food ingredients he was shown. TR, at p. 601, ln. 24 – p. 603, ln. 22; p. 611, ln. 25 – p. 612, ln. 19 (December 3, 2007); Ex. 6.

138. During the site inspection of the Encinitas Restaurant Plaintiff did not provide Ms. Arriaga with any non-oral cues indicating that he was frustrated, dissatisfied or desired further accommodations than those that had been provided. To the contrary, by affirmatively informing Ms. Arriaga that the samples of food that she showed him were acceptable, and by indicating through oral communications and non-oral cues that the service was acceptable, Plaintiff gave Chipotle every reason to believe that he was satisfied with its service and that he did not need or desire any further accommodations. TR, at p. 457, ln. 21 – p. 458, ln. 5 (November 30, 2007); p. 601, ln. 24 – p. 603, lns. 1-22; p. 615, lns. 16-20; p. 618, lns. 8-22 (December 3, 2007); Ex. 6.

139. Plaintiff was able to communicate effectively with the Chipotle employees who served him during the site inspections of the Encinitas and Pacific Beach Restaurants. TR, at p. 458, ln. 9 – p. 459, ln. 11 (November 30, 2007).

140. Plaintiff admitted that, during the site inspections of the Restaurants, he found the samples that he was shown by the employees who served him (all of which represented actual serving sizes) to be very helpful in de-

termining what to order. TR, at p. 463, lns. 16-21 (November 30, 2007).

141. During the site inspections, it took Plaintiff approximately three minutes to proceed through the food service line. TR, at p. 405, lns. 19-21 (November 30, 2007).

142. During the site inspections, it took Plaintiff only one minute longer to proceed through the food service lines of the Pacific Beach and Encinitas Restaurants than it takes an average customer to proceed through those lines, and significantly less time than it takes some first-time customers to proceed through the food service line. TR, at p. 208, ln. 16 – p. 209, ln. 2; p. 345, ln. 15 – p. 346, ln. 3 (November 29, 2007); TR, at p. 405, lns. 19-21 (November 30, 2007).

143. Chipotle has never received any complaints from any customers in wheelchairs regarding the accessibility of the Pacific Beach or Encinitas Restaurants. TR, at p. 463, ln. 25 – p. 465, ln. 5 (November 30, 2007); TR, at p. 593, lns. 1-20; p. 642, ln. 6 – p. 643, ln. 10; TR, at p. 606, ln. 23 – p. 607, ln. 24; p. 628, lns. 5-24 (December 3, 2007).

144. Neither Plaintiff nor his representatives made any effort to contact Chipotle's management to complain about his experiences at the Restaurants before filing this lawsuit. TR, at p. 437, ln. 6 – p. 438, ln. 20 (November 30, 2007).

XI. Parking at the Encinitas and Pacific Beach Restaurants

145. Plaintiff did not introduce any evidence at trial that he encountered any barriers to his ability to use the handicapped parking spaces at the Encinitas Restaurant.

146. Plaintiff testified that he encountered barriers in using the handicapped parking spaces on two occasions

when he drove to the Pacific Beach Restaurant—namely, that a curb ramp protruded into the access aisle and the handicapped parking spaces. TR, at p. 420, ln. 6 – p. 422, ln. 16 (November 30, 2007).

Conclusions of Law

I. Equivalent Facilitation

CL1. The Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, was enacted on July 26, 1990. The primary purpose of the ADA was to provide a "clear and comprehensive national mandate for the elimination of discrimination" with "clear, strong, consistent, enforceable standards" to address such discrimination. *See* 42 U.S.C. § 12101(b)(1), (2).

CL2. Plaintiff's ADA claims in this action are based on Title III of the ADA. Section 302 of Title III prohibits discrimination against disabled individuals in any place of public accommodation. 42 U.S.C. § 12182. Restaurants, bars and other establishments serving food or drink are public accommodations within the meaning of the ADA. 42 U.S.C. § 12181(7).

CL3. Section 302 of Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . . ." 42 U.S.C. § 12182(a).

CL4. Title III gives the Department of Justice the authority to develop regulations implementing the requirements of the anti-discrimination requirements of the statute. 42 U.S.C. §§ 12183(a)(1), 12186(b).

CL5. Pursuant to that authority the Department of Justice has adopted the ADAAG, which set forth general construction guidelines to ensure that new facilities are

accessible to persons with disabilities. 28 C.F.R. §§ 36.401(a)(1), (c)(1), 36.402(a)(1), Appendix B – preamble to Regulations on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,546 (July 26, 1991), p. 593. Failure of newly constructed facilities (such as the Encinitas and Pacific Beach Restaurants) to abide by the construction guidelines in the ADAAG violates the ADA. *Id.*; 42 U.S.C. § 12183(a)(1).

CL6. A violation of Title III of the ADA also constitutes a violation of the CDPA. Cal. Civ. Code § 54(c), (d). Under the CDPA, a plaintiff may only recover damages for each visit to a noncompliant place of public accommodation or each specific instance in which a plaintiff is deterred from attempting to visit a non-compliant place of public accommodation; CDPA damages may not be awarded for each alleged architectural barrier a plaintiff encountered during a single visit to a noncompliant place of public accommodation. *See* Cal. Civ. Code § 54.3(a); *Molski v. Rapazzini Winery*, 400 F. Supp. 2d 1208, 1211 (N.D. Cal. 2005); *Organization for the Advancement of Minorities with Disabilities v. Pacific Heights Inn*, 2006 US. Dist. LEXIS 2049, *8-9 (N.D. Cal. Jan. 20, 2006); *Martinez v. Longs Drugs Stores*, 2005 U.S. Dist. LEXIS 39236, *6 (E.D. Cal. August 25, 2005).

CL7. This Court held in its June 14, 2007 Order on the Parties' Cross Motions for Summary Judgment that the food preparation counters in Chipotle's restaurants must comply with the requirements of ADAAG Section 7.2(2), which governs sales and service counters that may not have a cash register but at which goods or services are sold or distributed. Section 7.2(2) of the ADAAG requires that either:

(1) a portion of the main counter which is a minimum of 36 in (915 mm) in length shall be provided with a maximum height of 36 in (915 mm); or

(2) an auxiliary counter with a maximum height of 36 in (915 mm) in close proximity to the main counter shall be provided; or

(3) equivalent facilitation shall be provided.

Antoninetti v. Chipotle Mexican Grill, Inc., Case No. 05CV1660-J, Order on the Parties' Motions For Summary Judgment, at 10-13 (S.D. Cal., June 14, 2007) (Jones, J.); 28 C.F.R. § 36, Appendix A § 7.2(2).

CL8. This Court also found in its Order on the Parties' Cross Motions for Summary Judgment that the portion of the food service counter where the cash registers are located (the transaction station), which is approximately 35 inches high, does not satisfy the requirements of subsections (i) and (ii) of Section 7.2(2). *Antoninetti v. Chipotle Mexican Grill, Inc.*, Case No. 05CV1660-J, Order on the Parties' Motions For Summary Judgment, at 10-13 (S.D. Cal., June 14, 2007) (Jones, J.). However, the Court found that Chipotle's practice and policy of providing accommodations to customers with disabilities may constitute an equivalent facilitation under Section 7.2(2)(iii), depending on the resolution of factual disputes at trial. *Id.*

CL9. Under ADAAG Section 2.2, "departures from particular technical and scoping requirements of the ADAAG by the use of other designs and technologies are permitted where the alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility." 28 C.F.R. § 36, Appendix A §§ 2.2, 7.2(2)(iii).

CL10. Policies and practices that provide substantially equivalent or greater access to and usability of a facility constitute a form of equivalent facilitation. *Antoninetti v. Chipotle Mexican Grill, Inc.*, Case No. 05CV 1660-J, 2007 WL 2456223, *4 (S.D. Cal., August 23, 2007); 28 C.F.R. § 36, Appendix A § 7.2(2)(iii); *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698, 727(D. Or. 1997); *Access 4 All, Inc. v. The Atlantic Hotel Condominium Association, LLC*, Case No. 04-61740 CIV COHN, 2005 U.S. Dist. LEXIS 41601, *47 (S.D. Fla. November 22, 2005).

CL11. A defendant who chooses to utilize alternative methods that it believes will provide equal or greater access has the burden of demonstrating that the alternative design or technology qualifies as an equivalent facilitation. *Ind. Living Center v. Oregon Arena*, 982 F. Supp. 698, 727; and see TAM (1994 supp.) § III-7.2100.

A. Defendant's Unwritten Practice of Accommodations is not Equivalent Facilitation.

CL12. Defendant's prior informal policy provided no directive to its employees about the methods that must be utilized to accommodate people in wheelchairs who want to see the food ingredients available for their entrées. Under the unwritten practice of providing all customers, including customers with disabilities, excellent customer service; Defendant attempted to provide customers in wheelchairs with an experience that was similar to the experience of standing customers. However, its managers and crew were to use their own judgment and common sense to determine when and how to accommodate a customer in a wheelchair. This subjective interpretation and enforcement of Defendant's informal Policy rendered the unwritten policy incapable of uniform en-

forcement or a confid[e]nt conclusion that these actions were equivalent facilitation.

CL13. California Civil Code Section 54 provides that people with disabilities are entitled to the same rights as non-disabled to the full and free use of public buildings, public facilities and other public places. Civil Code Section 54 also provides that any violation of the Americans with Disabilities Act is a violation of Section 54(c). California Civil Code Section 54.3 also provides monetary damages to the plaintiff in the amount of $1000.00 for each and every offense of Civil Code Section 54.

CL14. Evidence at trial prov[ed] that Plaintiff was a bona fide customer, and thus entitled to damages for Defendant's failure to provide equivalent facilitation, to the Restaurants on at least five occasions. The Court **FINDS** that Plaintiff is not entitled to recover any damages in connection with his visit to the Pacific Beach Restaurant three days before his deposition or in connection with site-inspection visits to the two Restaurants, because, in each instance, he was not a bona fide customer but rather was visiting those Restaurants as a litigant for the purpose of gathering evidence to support his claims in this litigation. Accordingly, Plaintiff is entitled to $1000.00 for each visit to Chipotle as a bona fide customer before the filing of the lawsuit.

B. Defendant's Current Customers With Disabilities Policy is an Equivalent Facilitation.

CL15. This Court also finds that Defendant has met its burden of establishing that its Customers With Disabilities Policy provides Plaintiff (and other customers in wheelchairs) with substantially equal or greater access to its facilities.

CL16. Unlike the prior unwritten policy, the written Customers With Disabilities Policy imposes two new re-

quirements that render it equivalent facilitation where the prior unwritten policy is not. Under the written Customers With Disabilities Policy, the pre-existing accommodations that Chipotle provided as part of its mission for excellent customer service are set forth plainly with two new requirements: (1) it is established that it is the responsibility of the manager on duty at the Restaurant, rather than his or her crew members, to carry out the policy (by requiring the manager on duty to greet a customer with a disability and inquire as to whether he or she desires any accommodations as soon as he or she approaches the tortilla station in the food serving line) and (2) it established that the manager on duty must affirmatively inform the customer with a disability of the various accommodations options without waiting for the customer to request them through oral communications or non-oral cues.

CL17. The written policy, unlike the informal policy, describes at least three accommodations for customers in wheelchairs which provide substantially equal access to Chipotle facilities. Under the written policy, the manager on duty is directed to greet customers in wheelchairs at the first station of the food service line and, if he or she does not recognize the individual as a regular customer, ask the individual if he or she has ever been to a Chipotle restaurant. If the customer responds that he or she has been to a Chipotle restaurant, the manager will advise the customer to alert the manager if he or she would like any assistance in placing his or her order. If the customer responds that he or she has never been to a Chipotle restaurant before, the manager on duty will affirmatively inform the customer of the different ways that Chipotle can accommodate him or her during the ordering process. Specifically, the manager will suggest

that Chipotle employees can lift samples of the food ingredients using tongs or spoons, provide the customer with samples of each of the food items that the customer would like to see or taste in clear plastic portion cups, allow the customer to watch his or her entrée being assembled either at the expo station at the end of the food service line, or at a table in the dining area of the restaurant. If the manager recognizes a customer with a disability as a regular customer of the restaurant, the manager will then apply his or her knowledge of the customer and the customer's past requests and preferences to determine whether the customer desires or needs any accommodations. Where a regular customer repeatedly requests a certain kind of accommodation, that accommodation will be provided automatically by the manager. Where the customer indicates that he or she does not desire any accommodation, on subsequent visits the manager will not continue to inquire as to whether that customer desires accommodation, unless the customer indicates either orally or through non-oral cues that he or she may want or need to be accommodated. Chipotle's managers are taught to observe both oral and non-oral cures from its customers, and to offer additional services to customers based on those cues.

CL18. Defendant presented uncontroverted evidence that since the Customers with Disabilities Policy was created in February of 2007, the company has trained all of the managerial and crew member employees in the Restaurant on the Policy. Furthermore, both General Managers of the Restaurants (Maritza Arriaga and Kevin Kupper) testified that they themselves have either personally applied the Customers With Disabilities Policy or witnessed it being applied by one of their managers. Chipotle also presented uncontroverted evidence

that there have been no complaints made against Chipotle by customers in wheelchairs regarding the a[c]cessib[i]lity of the Restaurants (either before or after the implementation of the Customers with Disabilities Policy).

CL19. Plaintiff has presented no evidence to rebut the existence or effectiveness of the Customers With Disabilities Policy itself, or of the training of Chipotle's employees at the Restaurants concerning the Policy. In fact, aside from his visit to the Pacific Beach Restaurant which he testified was for the purpose of preparing for his deposition, and the site inspections of the Restaurants conducted as part of the discovery process in this litigation, Plaintiff has not visited the Restaurants after the Customers With Disabilities Policy was implemented.

CL20. For these reasons, the Court **FINDS** that Defendant's current Customers With Disabilities Policy provides Plaintiff (and other customers in wheelchairs) with equivalent facilitation under ADAAG Sections 2.2 and 7.2(2)(iii).

II. Injunctive Relief

CL21. The remedies available under Title III of the ADA are limited to injunctive relief, including injunctive relief to require the defendant to alter facilities to make such facilities "readily accessible to and usable by persons with disabilities," or, where appropriate, injunctive relief "requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods." 42 U.S.C. § 12188(a)(2); 42 U.S.C. § 2000a-3(a). The same injunctive relief is available under the CDPA. Cal. Civ. Code § 54.3(a).

CL22. Injunctive relief is an equitable remedy, and is not available as a matter of course. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982). The specific elements that must be proven in order to obtain injunctive

relief are: (1) an irreparable injury; (2) inadequacy of legal remedies; (3) a balance of hardships favoring the plaintiff; and (4) advancement of the public interest. *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998); *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983). It is the plaintiff's burden to establish these elements. *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 956 (11th Cir. 1982). Injunctive relief should be denied unless it is the only means of ensuring compliance. *Weinberger* at 314.

CL23. A plaintiff seeking injunctive relief under the ADA "must demonstrate that an injunction . . . is justified by the relief it will provide." *Access Now, Inc. v. South Florida Stadium Corporation*, 161 F. Supp. 2d 1357, 1369 (S.D. Fla. 2001). "[W]hether a requested alteration would be effective is relative to the impediment presented by the barrier and the associated cost of removing it." *Id.*, at 1369-70.

CL24. Here, Plaintiff seeks an injunction requiring Chipotle to lower the Wall at the Restaurants to a maximum height of 36 inches. For the following reasons, this Court **FINDS** that Plaintiff has failed to satisfy his evidentiary burden for his requested injunctive relief.

CL25. This Court **FINDS** that Plaintiff has failed to satisfy his burden of establishing the existence of any irreparable injury.

CL26. First, the uncontroverted evidence is that Plaintiff never visited either of the Restaurants as a bon[a] fide customer after the implementation of the written Customers With Disabilities Policy; for this reason alone, he has failed to present any credible evidence that Chipotle's current accommodations policy and practices do not provide him with an equivalent facilitation. Chipotle, on the other hand, has presented uncontroverted evidence that its Customers With Disabilities Pol-

icy is effective, and that, since its implementation, there have been no complaints by any customers in wheelchairs regarding the accessibility of the Restaurants' food serving lines.

CL27. Second, in order to establish the existence of irreparable injury, Plaintiff must prove that he in fact plans to return to the Restaurants. *Molski v. Kahn Winery*, 405 F. Supp. 2d 1160,1164 (C.D. Cal. 2005). Where a plaintiff's plans to return to an establishment are not "concrete," the court must satisfy itself that a plaintiff's professed intent to return is sincere and supported by the facts. *Molski*, 405 F. Supp. 2d at 1164. In determining whether a plaintiff has a sincere intent to return, the Court may consider the plaintiff's litigation history. *Id.* (citing plaintiff's litigation history, as particularly telling with regards to his credibility as a witness and his professed intent to return to the defendant's establishment).

CL28. Based on the evidence presented at trial, this Court **FINDS** that Plaintiff's purported desire to return to the Restaurants is neither concrete nor sincere or supported by the facts. Plaintiff only visited the Encinitas Restaurant once (disregarding his site inspection conducted during the discovery process in this litigation). That sole visit took place nearly three years ago, in February 2005. This uncontroverted evidence belies Plaintiff's contention that he intends to return to the Encinitas Restaurant. Even with respect to the Pacific Beach Restaurant, which Plaintiff testified was located within walking distance of his home, Plaintiff has not returned to that Restaurant since October 2006—over a year ago. He testified that he first visited the Pacific Beach Restaurant in February 2005, and that, most recently, he visited the Restaurant twice in early October 2006 as a litigant (*i.e.*, in order to prepare for his deposition and for

the site inspections). Aside from these three visits, Plaintiff testified at trial that he was unable to recall the dates (or even the exact number) of his other visits to the Pacific Beach Restaurant—other than that they all occurred after he filed this lawsuit in August 2005. Based on this evidence alone, this Court **FINDS** that Plaintiff has failed to meet his burden that he intends to return to either of the Restaurants.

CL29. Plaintiff's history as a plaintiff in accessibility litigation supports this Court's finding that his purported desire to return to the Restaurants is not sincere. Since immigrating to the United States in 1991, Plaintiff has sued over twenty business entities for alleged accessibility violations, and, in all (but one) of those cases, he never returned to the establishment he sued after settling the case and obtaining a cash payment. In particular:

> i. Plaintiff filed an accessibility lawsuit against San Diego Pier Café without making any pre-lawsuit attempt to resolve his concerns with the restaurant's management. Plaintiff settled that lawsuit for a cash payment, and never returned to the restaurant.
>
> ii. Plaintiff filed two accessibility lawsuits against Dixieline Lumber Company without making any pre-lawsuit attempt to resolve his concerns with that company's corporate management. Plaintiff settled that lawsuit for a cash payment.
>
> iii. Plaintiff filed an accessibility lawsuit against a Holiday Inn hotel in downtown Los Angeles, after visiting that hotel only once and without making any pre-lawsuit attempt to resolve his concerns with the hotel's corporate management. Plaintiff settled that lawsuit for a cash payment, and never returned to the hotel.

iv. Plaintiff filed an accessibility lawsuit against a restaurant called Mr. Bertrand without making any pre-lawsuit attempt to resolve his concerns with the restaurant. Plaintiff settled that lawsuit for a cash payment, and never returned to the restaurant.

v. Furthermore, on one occasion Plaintiff filed lawsuits against at least eighteen different businesses based on a one-day visit to a shopping mall in Oceanside. Plaintiff had never shopped at that mall before. He did not visit the mall as a customer. Rather, Plaintiff visited that mall at the suggestion of a plaintiffs' side law firm specializing in the area of accessibility law for which Plaintiff had previously served as a[ ] paid accessibility/expert witness more than fifty times, and because he hoped that the law firm would retain him as a paid accessibility consultant/expert witness in any accessibility lawsuit(s) that it would file against the mall stores. Plaintiff brought with him to his visit a measuring tape and camera for the purpose of looking for accessibility violations. As a result of his visit to the mall, Plaintiff agreed to be, and in fact became, a named plaintiff in accessibility lawsuits against at least eighteen separate businesses that had stores at the mall. Even though he had gone to the mall for the purpose of looking for accessibility violations with the hope of being retained as a paid consultant/expert witness, Plaintiff alleged in the mall lawsuits that he had suffered bodily injury as a result of his visits to the stores. Plaintiff did not make any pre-litigation attempt to resolve his concerns with the management of the businesses that he sued. Plaintiff settled these lawsuits for cash payments, and never returned to the mall.

CL30. Based on these facts, this Court **FINDS** that Plaintiff has failed to satisfy the required showing of irreparable injury. For these reasons, Plaintiff's demand for injunctive relief is **DENIED**.

CL31. This Court also **FINDS** that Plaintiff has failed to meet his burden of proof that the requested injunction is in the public interest, particularly in light of Chipotle's uncontroverted evidence that it has served customers in wheelchairs at the Restaurants both before and after the written Customers With Disabilities Policy was implemented, and that it has never received any complaint from a customer in [a] wheelchair regarding the accessibility of the food serving lines at the Restaurants.

CL32. Finally, this Court **FINDS** that Plaintiff has failed to satisfy his burden that the requested injunction "is justified by the relief it will provide." *Access Now, Inc.*, 161 F. Supp. 2d at 1369. Plaintiff presented no evidence at trial either as to the reasons that Chipotle designed the Wall at the height that it did, or as to the cost or feasibility of enjoining Chipotle to lower the Wall to a maximum of 36 inches. While Plaintiff and his expert witness testified that other restaurants have lower walls, such testimony does not constitute evidence as to the cost or feasibility of enjoining Chipotle to lower its counters. Furthermore, the Court finds the photograph of the Subway store taken by Plaintiff's expert witness (which, as the last page of Exhibit 71, was admitted into evidence) uninformative and unpersuasive because it does not fully and accurately depict the entire height of the wall from the floor to the bottom of the glass sneeze guard. In any event, the Subway photo seems to show that the wall at the Subway store also exceeded 36 inches in height.

CL33. For these reasons, this Court **DENIES** Plaintiff's demand for injunctive relief under the ADA and the CDPA.

III. Damages For The Parking Lots

CL34. Plaintiff seeks the statutory minimum of $1000.00 in damages for each occasion on which he visited the Restaurants and encountered barriers to his ability to use the handicapped parking spaces at those Restaurants.

CL35. At trial Plaintiff identified two occasions when he encountered the alleged barriers to his ability to use the handicapped parking space at the Pacific Beach Restaurant.

CL36. Plaintiff failed to present any evidence at trial establishing any occasions where he encountered alleged barriers to his ability to use the handicapped parking space at the Encinitas Restaurant.

CL37. Accordingly, Plaintiff is entitled to $2000.00 for his claims relating to the Pacific Beach Restaurant parking lot, and is not entitled to recover any damages for any alleged accessibility violations relating to the Encinitas parking lot.

IV. Plaintiff's Damages Award

CL38. Having found that Defendant's prior unwritten policy was not equivalent facilitation under 7.2(2)iii of the ADAAG, and that Plaintiff was a bona fide customer to the Restaurants on five total occasions (once to the Encinitas Restaurant and four times to the Pacific Beach Restaurant), Plaintiff is entitled to $1000.00 for each visit to the Restaurants. Accordingly, the Court awards Plaintiff a total of $5000.00 for Defendant's violation of the ADA and CDPA.

CL39. Although Plaintiff suffered harm at the parking lot of the Pacific Beach Restaurant on two occasions, the CDPA [] does not provide damages for each and every architectural barrier that a Plaintiff encounters. Thus, although Defendant's failure to comply with the ADA with regards to the parking barriers does entitle Plaintiff to relief, that relief is capped at the $1000.00 that Plaintiff is already awarded for Defendant's failure to provide Plaintiff with equivalent facilitation within the Restaurants.

Conclusion

While the Court is sympathetic to Plaintiff's, and other customers with disabilities, request to have the same Chipotle experience that standing customers have, the evidence suggests that Defendant's new written policy will provide a substantially equivalent experience for customers with disabilities. Absent evidence to the contrary, and with the understanding that the ADA does not require that establishments provide exactly the same experience for disabled customers as they do for non-disabled customers, the Court finds that Defendant's written Customers With Disabilities Policy does provide equivalent facilitation. For the above reasons, the Court **FINDS** that Defendant's Customers With Disabilities Policy provides equivalent facilitation under the guidelines of ADAAG 7.2(2)(iii). Additionally, the Court **AWARDS** Plaintiff $5000.00, and no more, for Defendant's failure to accommodate under the rules of the ADA and CDPA during Plaintiff's visits to Chipotle before the implementation of the Customers With Disabilities Policy.

IT IS SO ORDERED.

APPENDIX D
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOS. 08-55867, 08-55946, 09-55327, 09-55425
D.C. NO. 3:05-CV-01660-J-WMC

MAURIZIO ANTONINETTI,
Plaintiff-Appellant, Cross-Appellee,

v.

CHIPOTLE MEXICAN GRILL, INC.,
Defendant-Appellee, Cross-Appellant.

Appeal from the United States District Court
for the Southern District of California
Napoleon A. Jones, District Judge, Presiding

SEPTEMBER 22, 2010

ORDER

Before: DANIEL M. FRIEDMAN,* DOROTHY W. NELSON, and STEPHEN REINHARDT, Circuit Judges.

The opinion filed July 26, 2010 is amended as follows. On page 10643 of the slip opinion, after the sentence, "We must therefore be 'particularly cautious' regarding 'credi-

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* Daniel M. Friedman, United States Circuit Judge for the Federal Circuit, sitting by designation.

bility determinations that rely on a plaintiff's past [Disabilities Act] litigation.' *Id.*," insert the following text:

> Such caution is especially appropriate in this case where, as previously noted, Chipotle stipulated that "Antoninetti wants to be able to have the 'Chipotle experience.'" Accordingly, there can be no doubt that Antoninetti wanted to return to the Chipotle restaurants to enjoy the same experience that other non-disabled Chipotle customers could have. The district court's finding thus is inconsistent with and totally undermined by the parties' stipulation.

With these amendments, the petition for rehearing is DENIED. No judge has requested a vote on the petition for rehearing en banc. The petition for rehearing en banc is DENIED. No further petitions will be entertained.

APPENDIX E

STATUTORY AND REGULATORY PROVISIONS

1. Title III of the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 353 (codified as amended at 42 U.S.C. §§ 12181-12189) provides in relevant part as follows:

§ 12182. Prohibition of discrimination by public accommodations

(a) General rule

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

* * * * *

§ 12183. New construction and alterations in public accommodations and commercial facilities

(a) Application of term

Except as provided in subsection (b) of this section, as applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title includes—

(1) a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter;

* * * * *

§ 12186. Regulations

* * * * *

(b) Other provisions

Not later than 1 year after July 26, 1990, the Attorney General shall issue regulations in an accessible format to carry out the provisions of this subchapter not referred to in subsection (a) of this section that include standards applicable to facilities and vehicles covered under section 12182 of this title.

* * * * *

§ 12188. Enforcement

(a) In general

(1) Availability of remedies and procedures

The remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183 of this title. Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions.

(2) Injunctive relief

In the case of violations of sections 12182(b)(2)(A)(iv) and section[1] 12183(a) of this title, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by indi-

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[1] So in original. The word "section" probably should not appear.

viduals with disabilities to the extent required by this subchapter. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this subchapter.

(b) Enforcement by Attorney General

(1) Denial of rights

(A) Duty to investigate

(i) In general

The Attorney General shall investigate alleged violations of this subchapter, and shall undertake periodic reviews of compliance of covered entities under this subchapter.

(ii) Attorney General certification

On the application of a State or local government, the Attorney General may, in consultation with the Architectural and Transportation Barriers Compliance Board, and after prior notice and a public hearing at which persons, including individuals with disabilities, are provided an opportunity to testify against such certification, certify that a State law or local building code or similar ordinance that establishes accessibility requirements meets or exceeds the minimum requirements of this chapter for the accessibility and usability of covered facilities under this subchapter. At any enforcement proceeding under this section, such certification by the Attorney General shall be rebuttable evidence that such State law or local ordinance does meet or exceed the minimum requirements of this chapter.

(B) Potential violation

If the Attorney General has reasonable cause to believe that—

(i) any person or group of persons is engaged in a pattern or practice of discrimination under this subchapter; or

(ii) any person or group of persons has been discriminated against under this subchapter and such discrimination raises an issue of general public importance,

the Attorney General may commence a civil action in any appropriate United States district court.

(2) Authority of court

In a civil action under paragraph (1)(B), the court—

(A) may grant any equitable relief that such court considers to be appropriate, including, to the extent required by this subchapter—

(i) granting temporary, preliminary, or permanent relief;

(ii) providing an auxiliary aid or service, modification of policy, practice, or procedure, or alternative method; and

(iii) making facilities readily accessible to and usable by individuals with disabilities;

(B) may award such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved when requested by the Attorney General; and

(C) may, to vindicate the public interest, assess a civil penalty against the entity in an amount—

(i) not exceeding $50,000 for a first violation; and

(ii) not exceeding $100,000 for any subsequent violation.

(3) Single violation

For purposes of paragraph (2)(C), in determining whether a first or subsequent violation has occurred, a determination in a single action, by judgment or settlement, that the covered entity has engaged in more than one discriminatory act shall be counted as a single violation.

(4) Punitive damages

For purposes of subsection (b)(2)(B) of this section, the term "monetary damages" and "such other relief" does not include punitive damages.

(5) Judicial consideration

In a civil action under paragraph (1)(B), the court, when considering what amount of civil penalty, if any, is appropriate, shall give consideration to any good faith effort or attempt to comply with this chapter by the entity. In evaluating good faith, the court shall consider, among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability.

2. Section 204(a) of Title II of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 244 (codified at 42 U.S.C. § 2000a-3(a)) provides as follows:

§ 2000a-3. Civil actions for injunctive relief

(a) Persons aggrieved; intervention by Attorney General; legal representation; commencement of action without payment of fees, costs, or security

Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a-2 of this title, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

3. Section 7.2 of the ADA Accessibility Guidelines, 28 C.F.R. pt. 36, app. A, provides in relevant part as follows:

7.2 Sales and Service Counters, Teller Windows, Information Counters.

* * * * *

(2) At ticketing counters, teller stations in a bank, registration counters in hotels and motels, box office ticket counters and other counters that may not have a

cash register but at which goods or services are sold or distributed, either:

(i) a portion of the main counter which is a minimum of 36 in (915 mm) in length shall be provided with a maximum height of 36 in (915 mm); or

(ii) an auxiliary counter with a maximum height of 36 in (915 mm) in close proximity to the main counter shall be provided; or

(iii) equivalent facilitation shall be provided (e.g., at a hotel registration counter, equivalent facilitation might consist of: (1) provision of a folding shelf attached to the main counter on which an individual with a disability can write, and (2) use of the space on the side of the counter or at the concierge desk, for handing materials back and forth).

All accessible sales and service counters shall be on an accessible route complying with 4.3.

* * * * *

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(2)

Supreme Court, U.S.
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No. 10-1051

In The Supreme Court of The United States

CHIPOTLE MEXICAN GRILL, INC.,
Petitioner,

v.

MAURIZIO ANTONINETTI,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether certiorari should be granted where the court of appeals did not decide either of the Questions Presented by petitioner, where the case may be mooted, and where one question seeks a ruling on standards for an injunction, in the absence of any injunction below.

2. Whether, under *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), a court may issue an injunction without application of the four-factor test, where the statute provides for mandatory injunctive relief to remedy its violation.

3. Whether a plaintiff with disabilities, a customer in a fast food restaurant, has Article III standing under Title III of the Americans with Disabilities Act, when it is uncontested that the restaurant violated the ADA, he lives close by, would return "tomorrow," and he has been harmed and deterred from returning by continuing ADA violations.

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No. 10-1051

In the
Supreme Court of the United States

Chipotle Mexican Grill, Inc.,

Petitioner,

v.

Maurizio Antoninetti,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

Respondent Maurizio Antoninetti respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals opinion of July 26, 2010, as amended by the September 22, 2010 order on petition for rehearing, is at 1a-20a. The September

22, 2010 order is reported at 2010 U.S. App. LEXIS 19923.

Chipotle provides the citation as 614 F.3d 971, which is to the original July 26, 2010 opinion, which is at Pet. 21a-39a.

Subsequent to the decision of the court of appeals, the district court held a hearing and on November 29, 2010 issued an unreported order relevant to these proceedings. It is attached to this Brief at 1a.

INTRODUCTION

This lawsuit is controlled by its facts, including a factual stipulation dispositive on a crucial issue. The court of appeals did not decide either of the two questions presented, and there is no conflict among the circuits on either question.

Chipotle Grill. Inc. operates fast food restaurants which trumpet the "Chipotle Experience." Instead of simply receiving food prepared like other restaurants in its category, Chipotle customers move along the service line, and view, select and choose among a variety of attractively displayed fresh ingredients, which are then custom-assembled under the customer's scrutiny before the meal is paid for and received. Eye-catching appearance of bins of prospective ingredients is a key element of the Chipotle Experience; for example, chicken must have "dark caramel grill lines" and rice must be "bright white, visually fresh, with vibrant green cilantro." Food is prepared in open kitchens designed by Chipotle to be a "feast for the eyes."

Chipotle constructed the two restaurants in question in 2002, years after the 1993 national deadline for compliance with the architectural requirements of the Americans with Disabilities Act, and chose to construct a wall 44 inches high between the customer and the food being custom-assembled for customers. Customers who use wheelchairs are unable to see or to choose the ingredients as non-disabled customers can, and they cannot see into the food preparation and open kitchen promoted as key components of the restaurant's allure.

Antoninetti, who uses a wheelchair for mobility, was repeatedly denied by Chipotle the opportunity to be served in the same manner as non-disabled customers. Chipotle literally walled him off from the "Chipotle Experience."

The district court found Chipotle liable for violation of Title III of the ADA which forbids public accommodations from discriminating against people with disabilities, and liable for violating a state law which incorporates the ADA. The court awarded damages. An injunction was denied. On appeal, the court held that Chipotle's walls violated the ADA, and that Antoninetti was entitled to an injunction and, potentially, additional damages. It held that Chipotle's walls violated the ADA and that Antoninetti was entitled to an in

Chipotle raises two questions which were not decided by the court of appeals. That court specifically refrained from deciding the first

question.[1] The second question was not raised by Chipotle in the court of appeals prior to the court of appeals panel decision; the issue was then raised in Chipotle's petition for rehearing but was not decided by the court of appeals.[2]

On the question of standards for an injunction, the petition essentially seeks interlocutory review; no injunction was issued by the district court. The court of appeals reversed and remanded for the district court to formulate an injunction in the first instance. The district court has since indicated that no injunction may be necessary.

There is no conflict among the circuits on the touchstones for issuance of an injunction when a statute has been violated. The circuits uniformly apply *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), and its progeny, which require consideration of each statute's objectives and text, and the circumstances of the case, to determine whether the four-factor criteria apply, or whether the statute requires a mandatory injunction against its violation. As to Title III of the Americans with Disabilities Act, there are no decisions of any court of appeals in conflict on this question.[3]

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[1] Chipotle's first question is: "Whether a statute's express provision for injunctive relief reduces or eliminates a plaintiff's burden of meeting the traditional criteria for injunctive relief?"

[2] Chipotle's second question is essentially whether the decision below conflicts with *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

[3] Only two circuits have mentioned the issue, and both refrained from deciding it. One is the Ninth Circuit in the case at bar and in *Long v. Coast Resorts, Inc.*, 267 F.3d 918, 923 (9th

On the standing question under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), even if it had been properly raised and decided below, which it was not, there is no conflict alleged or existent among the circuits. Antoninetti's uncontradicted testimony that he would return to the restaurants "tomorrow," that he lives nearby, together with the parties' stipulation that he wants to return to the restaurants,[4] make the facts in this case a far cry from the "some day intentions" in *Lujan*, as explicated in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000), the latter of which is not cited by Chipotle.

Essentially attacking the national objectives of the Americans with Disabilities Act, Chipotle urges review on certiorari, imposing a weight the case cannot bear:

- Chipotle raises the specter of "automatic, financially-crippling facilities-modification order[s]." Pet. at 23. Here, however, Chipotle explicitly waived any defense of cost to comply with the ADA. Chipotle is in no position to complain about being required to do what it was required to do years earlier.

Cir. Nev. 2001). The other is the Tenth Circuit's decision in an ADA testing case, *Rothberg v. Law Sch. Admission Council*, 102 Fed. Appx. 122, 125 (10th Cir. Colo. 2004).

[4] With regard to intention to return to Chipotle, the court of appeals found that the parties' stipulation is "inconsistent with and totally undermined" the district court's conclusion otherwise. Pet. at 2a. The district court did not mention the stipulation in its findings of fact, although the stipulation contradicted its conclusions.

- Chipotle seeks to undermine efforts of people with disabilities to enforce removal of architectural barriers to access to public accommodations. Chipotle's critique of Antoninetti for having filed other ADA litigation is unjustified by, and is irrelevant to, the issues in this case. With regard to litigation by others, the appropriateness of the use of testers in civil rights litigation is well established, and is no bar to injunctive relief to remedy violations of the ADA.

STATEMENT[5]

Chipotle operates a chain of fast food restaurants, including locations in San Diego/Pacific Beach and Encinitas, California, which are "new construction" as defined by the ADA.[6] Chipotle distinguishes itself from other fast food chains by providing its customers with the interactive "Chipotle Experience," which includes having customers participate as their food is being made.[7] Customers

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[5] Rather than submit a restatement of all the proceedings before the district court, Antoninetti integrates in this abbreviated statement correction of a number of omissions and misstatements in the Petition.

[6] District Court Findings of Fact (hereafter "FF") 1, 4-7, Pet. 44a.

[7] CR 92 / ER II-15, p. 86 (59:23-60:12), 148:23-149:5; CR 157 / ER I-7, Fact 45. References are to the record excerpts in the court of appeals and to the district court record. "CR" refers to the item at the District Court Record Docket Number. "ER" refers to "Appellant's Excerpts of Record" in the court of appeals, with the volume and item number. "SER" to the "Supplemental Excerpts of Record."

get to "see, select and direct" to customize their food so that they receive their "perfect burrito."[8]

Customers can see the portion sizes placed on their entrees and can tell staff if they want more or less of an ingredient.[9] Chipotle knows its customers "love to interact" and "watch closely as we put their meal together."[10] Chipotle wants its customers to "eat with their eyes,"[11] and it provides "the WOW factor" which is, among other things, the "right before their eyes" element.[12]

During the interactive ordering process, customers see sixteen large bins of food and can compare different food options, such as the various meat selections.[13] They can decide which of the

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[8] CR 92 / ER II-15, 106:5-12, 109:18-23, 130-134; CR 157 / ER I-7, Facts 18, 19, 26, 27; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibits / ER VII-29, pgs. 3, 6, 10, 21, 22, 23; CR 92 / ER II-15, 114:24-115:24; CR 157 / ER I-7, Fact 19; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibits / ER VII-29, p.1; CR 92 / ER II-15, p. 73 (137:12-22), p. 87 (114:17-23), 94, 95, 106:55-12, 110:13-111:3, 130, 145:11-14; CR 157 / ER I-7, Facts 17 to 27; CR 268 / ER VII-28, 647:11-650:3; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 1, 2, 3, 6, 21, 22, 23.

[9] CR 92 / ER II-15, p. 87 (114:17-23), 95; CR 157 / ER I-7, Facts 26, 27; CR 267 / ER IV-25, 57:1-7, 58:-321, 91:5-23.

[10] CR 92 / ER II-15, 115:20-24, 132; CR 265 / ER IV-25, 62:14-16, 309:24-310:2; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 3.

[11] CR 92 / ER II-15, 115:25-116:2, 132, 133; CR 229 / ER I-3, Fact 57.

[12] CR 92 / ER II-15, 121:8-122:4; CR 157 / ER I-7, Fact No. 25; CR 268 / ER VII-28, 647:11-650:3; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 6.

[13] CR 92 / ER II-15, DVDs at 205, 206, 207; CR 265 / ER IV-25, 61:19-63:14, 64:3-8. 65:3-11, 67:20-23; CR 266 / ER V-26, 311:3-

ingredients is more visually appealing to them,[14] and they can determine the freshness of the food, such as whether or not the barbacoa is dry, or the beans have a crust on them.[15] Appearance of the food is so important that Chipotle mandates specific details for the "look" of its food.[16] For example, chicken must have dark caramel grill lines, and rice must be "bright white, visually fresh, with vibrant green cilantro."[17]

Chipotle specifically designed its restaurants so that customers can see into the open kitchen and can see freshly marinated meats being grilled.[18] The open kitchens are designed to be a "feast for the eyes" and are intended "to bring customers more completely into the dining experience."[19] This is because "customers eat with their eyes."[20]

23; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibits / ER VII-29, 18, 19, 20, 21, 22, 23.

[14] CR 92 / ER II-15, DVDs at 205, 206, 207; CR 265 / ER IV-25, 61:19-63:14, 64:3-8. 65:3-11, 67:20-23; CR 266 / ER V-26, 311:3-23; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibits / ER VII-29, 18, 19, 20, 21, 22, 23.

[15] CR 92 / ER II-15, 146:22-147:15, 155:1-21; CR 265 / ER IV-25, 67:24-68:1, 68:23-25.

[16] CR 92 / ER II-15, 132, 133; CR 229 / ER I-1, FF3; CR 265 / ER IV-25, 68:19-69:5; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 3, 5.

[17] FF #3; Pet. 43a.

[18] CR 92 / ER II-15, 131; CR 266 / ER V-26, 311:8-11; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 2.

[19] CR 92 / ER II-15, 131; CR 157 / ER I-7, Fact 23; CR 265 / ER IV-25, 141:19-22; CR 266 / ER V-26, 308:2-12; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 2.

[20] FF #57 and 58; Pet. 54a-55a.

During his multiple visits to the two restaurants, Antoninetti could not see over the wall obstructing the view to the food preparation area.[21] His experience was quite different from that of non-disabled customers, in addition to being unable to experience the interactive and visual process. The accommodations were not helpful and he was not satisfied with the service he received.[22] He could not see how much of an ingredient was actually placed on his burrito and was never told the portion size of any ingredients that were actually being placed on his burrito.[23]

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[21] FF #40. 45-47; 54a-55a.

[22] Contrary to Petitioner's Statement, Antoninetti did not believe or admit that the accommodations provided him were acceptable. Chipotle's citations are to an employee's testimony, not Antoninetti's. His testimony was otherwise. The employee admitted on cross-examination that she simply guessed what Antoninetti meant when he nodded his head or said "okay" while she served him. She did not know, nor did she ask, if he meant that he could simply see the sample of food shown to him as opposed to being satisfied with the method of accommodation. ER VII-28, 613:18-614:16. In fact, Antoninetti's nod simply meant that he would take the ingredient shown to him. ER VI-27, 397:1-19.

When asked if seeing the sample cups of food helped him, Antoninetti said: "If I knew the quantity, the standard quantity, that would be an improvement." He also testified that he "did not know" if the quantity in the soufflé (sample) cups was the standard quantity per serving. CR 267 / ER VI-27, 463:16-24.

[23] CR 267 / ER VI-27, 399:15-400:3, 402:12-21, 403:9-11, 404:2-13, 410:22- 411:7. Ms. Arriaga, admitted that she never told Antoninetti that the amount of an ingredient she was showing him was the amount she actually placed on his burrito. CR 268 / ER VII-28, 612: 20-23.

Before and after filing his lawsuit, Antoninetti visited the Pacific Beach Chipotle at least six times and the Encinitas Chipotle two times.[24] The parties stipulated that Antoninetti wants to be able to have the "Chipotle Experience" - to see all of the wonderful, tasty ingredients on display, to see his burrito assembled and rolled, to make his "perfect burrito," quickly.[25]

Antoninetti would return to Chipotle's restaurants "tomorrow" if the walls were lowered and he had the chance to see the display and presentation that Chipotle provides to standing customers.[26] He has been deterred from returning to the restaurants since October 6, 2006 because the "accommodations" provided during the litigation-conducted site inspections were not appetizing or appealing and the experience was awkward and humiliating. If he returned, he would face the same issues.[27]

Years before Antoninetti filed his lawsuit, Chipotle had received numerous complaints from customers in wheelchairs about the inaccessibility of the food viewing areas at its restaurants. The complaints were that the height of the walls obstructed the view of the food preparation area for people in wheelchairs.[28]

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[24] CR 89 / ER II-13, p.7, par. 24; CR 229 / ER I-3, FF 128, 129, 130, 131, CL14.

[25] CR 89 / ER II-13, p. 7, par. 24; CR 157 / ER I-7, Fact 41.

[26] CR 267 / ER VI-27, 426:13-15.

[27] CR 89 / ER-13, 4:9-7:28; CR 267 / ER VI 27, 407:10-21, 412:23-413:25, 426:21- 427:10.

[28] CR 92 / ER II-15, p. 59 - 64.

Chipotle admitted that Antoninetti's requested injunctive relief could be accomplished without much cost or effort.[29] Chipotle offered no evidence, at any time, that it would be structurally impracticable to have designed and constructed its food preparation area without the offending wall.

From 1990 until the time he filed his Complaint against Chipotle in 2005, Antoninetti had filed suit against six different sites: two Dixieline stores, a Holiday Inn, the newly-remodeled Bertrand at Mr. A's restaurant, San Diego Pier Café restaurant and the newly-constructed Oceanside Mall. One of the sites, the Mall, was the subject of a number of additional cases against businesses inside the Mall, resulting in additional suits. While he initially visited the Mall as a potential ADA consultant for a law firm, Antoninetti asked to be a plaintiff in the Oceanside Mall cases because he was quite upset that a new mall was constructed with many blatant violations of the ADA. He hoped to deter other developers from constructing brand-new inaccessible facilities. [30] In each case, Antoninetti required defendants to remove architectural barriers as part of his settlements with them.[31]

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[29] CR 92 / ER II-15, p. 172, Response to Interrogatories 16 and 17; SER VIII-32.) Chipotle waived any defense that the requested injunctive relief was not readily achievable. (CR 92 / ER II-11.)

[30] CR 267 / ER VI-27, 505:3-14; 501:3-22.

[31] CR 267 / ER VI-27, 476:20-24.

REASONS FOR DENYING THE PETITION

I. The Court of Appeals Did Not Decide Either of the Questions Presented.

The Court of Appeals did not decide either of the questions raised in the petition.

A. Standards for an Injunction

Chipotle's first question is one which the Court of Appeals emphatically and explicitly did not decide in this case. Pet. 15a-16a.[32]

The Court of Appeals continued to "refrain[ ] from deciding" the question. In view of its finding that the district court should on remand determine the contours of any injunction, the court of appeals refused to decide the question:

> In view of that conclusion and disposition, we need not address the question, which the parties vigorously dispute but which the district court did not decide, whether the Disabilities Act authorizes a district court to deny injunctive relief after finding a violation of the Act.

Pet. 35a.

Unwilling to accept the court of appeals avowal, Chipotle states: "The court of appeals *purported* to express no view as to whether Title III ever 'authorizes a district court to deny injunctive relief after finding a violation of the Act.'" Pet. at 12 (emphasis added).

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[32] The district court had applied the four-factor test which Chipotle advocates here. Pet. 85a-88a.

Chipotle's Question 1 not having been decided in the court of appeals, it is not one on which certiorari should be granted.

B. The *Lujan* Question

Belatedly, Chipotle seeks a ruling on whether Antoninetti has standing to obtain an injunction. Chipotle asserts that the decision below conflicts with *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Prior to the panel decision on which certiorari is sought, the court of appeals was not requested to decide the *Lujan* question.[33] The courts below did not decide the *Lujan* question.

Chipotle raised this question for the first time in its *Petition for Panel Rehearing and Rehearing En Banc*, filed below August 16, 2010. The only question raised in that petition was the *Lujan* question. The petition was denied September 22, 2010, with no judge requesting a vote on the petition for rehearing *en banc*, and with no discussion of *Lujan*. Pet. at 2a.

Chipotle acknowledges that it failed to properly raise the question until its rehearing petition. Pet. at 28, n. 6. At note 6, Chipotle claims, however, that

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[33] Chipotle's *Opening and Response Brief of Appellee/Cross-Appellant* and its *Fourth Brief on Cross-Appeal Filed by Appellee-Cross-Appellant* do not cite *Lujan* or raise standing as an issue for decision. Similarly, Antoninetti's briefs before the court of appeals do not cite *Lujan*.

Chipotle's Fourth Brief, in a single phrase at page 35, submits that, if Chipotle is unsuccessful on the merits, there should be a remand "as to whether Antoninetti was denied access and therefore had standing." (Dkt 6829038 at 35 (Mar. 2, 2009)).

the court below "addressed the point" in its discussion under a different question. *Id.*, citing Pet. at 14a-15a. Even a quick glance at those pages reveals no discussion of standing at all.[34]

Certiorari should not be granted to review the question of possible conflict with *Lujan*, when that question is not decided below, and was not properly raised.

II. The Question on Injunction Standards Is Not Ripe for Decision.

A. A Decision on Standards for Issuance of an Injunction Would be Premature Because Changed Circumstances May Have Mooted that Issue.

Key circumstances have changed. The district court recently concluded that an injunction may not be necessary based on changed circumstances.

Subsequent to the decision before the court of appeals, Chipotle argued to the district court that this litigation is moot. Its counsel "represented that Chipotle has lowered food preparation counters to a height where wheelchair-bound customers can view the counter without obstruction. This modification has been made at all Chipotle restaurants in California, including the two restaurants at issue in this case." The order is attached to this brief at 1a (Order of November 29, 2010). Accordingly, "Defendant argues that these actions render moot

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[34] To the extent that there is even a bare allusion to the question, the court below resolves it based on the parties' fact stipulation. That fact-based decision is obviously inappropriate for review on certiorari.

the need to issue an injunction." *Id.* The district court suggested that an injunction may not be necessary:

> *Because an injunction is not necessarily the only means to accomplish this goal* [ensuring compliance with the ADA], limited discovery and briefing on this issue are appropriate.

Appendix below at 1a (emphasis added).[35]

At the hearing, Antoninetti's counsel advised the district court that Chipotle stated it wanted to be able to return to the original design, which Chipotle believed complied with the ADA.[36]

In light of the activity in the district court, and the possible mootness of the injunction issue, certiorari on that question would be inappropriate.[37]

B. In the Absence of an Injunction to Review, the Court Is Called Upon to Issue an Advisory Opinion.

Certiorari is also not warranted because the injunction issue presents only an abstract question of law and calls for an advisory opinion.

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[35] The district court set a schedule for discovery on mootness, a new summary judgment motion, with briefing ending May 13, 2011. App. 1a. (Order of November 29, 2010).

[36] This sentence, while not in the record, is provided for the Court's information because it bears on the question of possible mootness.

[37] The point here is on the prematurity of certiorari. Respondent does not waive his right to any argument, for or against mootness, in the district court, depending on the outcome of discovery and other factors.

The court of appeals did not determine the remedy to which Antoninetti was entitled. In finding that an "appropriate injunction" should be entered, the court expressed no view on the content of any relief. Instead, it deferred to the district court: "The precise contours of such an injunction are for the district court to determine in the first instance." Pet. 35a.

In the absence of an injunction, it is difficult, if not impossible, for this Court to measure all the circumstances against any standard to determine the validity of the non-existent "injunction."

III. There Is No Conflict Among the Circuits on When an Injunction Must Issue to Remedy a Statutory Violation.

A. No Court of Appeals Has Recognized Any Conflict Among the Circuits.

No court of appeals has recognized any inter-circuit conflict on the question of when an injunction must issue in the face of a federal statutory violation.

This case is governed by the test in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), as discussed below. Chipotle's statement that the "courts of appeals are well aware of the conflict" is supported solely by one disfigured quotation which omits the D.C. Circuit's critical phrase referencing *Romero-Barcelo*. *United States v. Microsoft Corp.*, 147 F.3d 935, 944 (D.C. Cir. 1998)

Chipotle's Pet. at 21-22	Complete Sentence from U.S. v. Microsoft Corp.
"some cases * * * took the view that mere statutory authorization of injunctive relief displaced equitable standards."	"Some cases *antedating Romero-Barcelo* took the view that mere statutory authorization of injunctive relief displaced equitable standards [citation omitted]"
(ellipsis in Petition, but not in the D.C. Cir. Decision)	(omitted phrase included and emphasized)

The omission of the reference to *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982), is significant because a proper understanding of that case demonstrates that there is no conflict among the circuits, as we now show.

B. *Weinberger v. Romero-Barcelo* Sets Forth the Longstanding Test, One on Which There Is No Inter-circuit Conflict.

Where courts consider issuance of an injunction in connection with violation of a statute, the legal standard is clear and long-established by this Court. Each of the cases which Chipotle cites to support its inter-circuit conflict simply adheres to that standard, or pre-dates the modern enunciation of the test. There is no conflict.

In *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-14 (1982), the Court set forth the test for determining whether and when Congress has limited the court's discretion by enacting a statute which requires an injunction as a remedy for violation of the statute. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." 456 U.S. at 313. If Congress does not restrict the court's equitable jurisdiction by statute, the four-factor test is applied.

Chipotle here ignores this important aspect of the *Romero-Barcelo* standard. *Romero-Barcelo* held that a statute may "require[ ] the District Court to enjoin" certain actions, citing *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978).[38] Courts must look to [t]he purpose and language of the statute," and "not the bare fact of a statutory violation." 456 U.S. at 313-314. Where "only an injunction could vindicate the objectives of the Act," 456 U.S. at 314, the statutory violation merits an injunction, without application of the traditional four-factor balancing test.[39]

As Chief Justice Burger famously described the limitations on judicial power:

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[38] The statute in question was superseded after *Tennessee Valley*. *See Hoosier Envtl. Council v. United States DOT*, 2007 U.S. Dist. LEXIS 90840 (S.D. Ind. Dec. 10, 2007).

[39] *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006) ("Nothing in the Patent Act indicates that Congress intended such a departure."). The majority and two concurring opinions of the Court in *ebay* discuss the jurisprudential considerations which underlie the Romero-Barcelo rule.

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.

Tennessee Valley Auth. v. Hill, 437 U.S. 153, 195 (1978).

The test referenced in *TVA* and further crafted in *Romero-Barcelo* is the one which Chipotle seeks to overturn. The test is not new. *United States v. San Francisco*, 310 U.S. 16, 31 (1940) (affirming grant of an injunction upholding a statute requiring San Francisco to distribute electric power publicly as a condition of a grant of federal land and rights; held that an injunction was required without a "balancing of equities" or "invocation of the generalities of judicial maxims." Violation of the statute alone required the injunction).

Decisions applying *Romero-Barcelo* examine each statute and apply its test to the typically fact-intensive circumstances in the particular case, together with the language and objectives of the statute.[40]

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[40] In *Romero-Barcelo* itself, the Court found that the Federal Water Pollution Control Act did not require an injunction against navy discharge of ordinance around Puerto Rico. 456 U.S. at 317-18.

The D.C. Circuit explained that "if a statute confers a *right* to an injunction once a certain showing is made, no plaintiff . . . need show no more than the statute specifies." *United States v. Microsoft Corp.*, 147 F.3d 935, 943 (D.C. Cir. 1998) (emphasis in original). The Seventh Circuit summarized the rule in *Illinois Bell Telephone Co. v. Illinois Commerce Commission*, 740 F.2d 566. 571 (7th Cir. 1984):

> Under traditional principles of equity, to receive a preliminary injunction a plaintiff must prove that it will suffer irreparable harm if the injunction is denied. However, where the plaintiff seeks an injunction to prevent the violation of a federal statute that specifically provides for injunctive relief, it need not show irreparable harm.

740 F.2d at 571. A case Chipotle cites to support its position, *Bedrossian*, actually agrees with Antoninetti's position that statutory "shall" language may eliminate the need for the traditional analysis. *Bedrossian v. Northwestern Memorial Hosp.*, 409 F.3d 840, 843 n. 1 (7th Cir. 2005).

C. The Courts Below Uniformly Follow the *Romero-Barcelo* Test.

The petition constructs a false dichotomy, classifying some courts of appeals as (rightly) applying the traditional four-part test to injunctions when a statute is violated, and other courts of appeals as (wrongly) granting injunctions automatically in that circumstance. Only by ignoring the robust *Romero-Barcelo* test does Chipotle create this non-existent dichotomy and,

thereby, assert an inter-circuit conflict where none exists.

In actuality, the cases fall around the line established in *Romero-Barcelo*. Generally, the traditional four-part test is applied, but where the objectives and language of the statute in question call for an injunction, there is no need to apply the traditional test.

All the cases cited in the petition as being on one side of the false dichotomy are actually decisions which, consistent with *Romero-Barcelo*, found that there was no right to an injunction under the particular statute, and therefore the traditional equitable balancing test is applied. *Huntington v. Marsh*, 859 F.2d 1134, 1143 (2d Cir. 1988) (Ocean Dumping Act provides for "such relief as to the equities of the case may require."); *Natural Resources Defense Council v. Texaco Ref. & Marketing*, 906 F.2d 934, 937 (3d Cir. 1990) (no statutory mandate for injunction); *Muffley v. Spartan Mining Co.*, 570 F.3d 534, 542 (4th Cir. 2009) (NLRA; the traditional four-part equitable test should govern what relief is statutorily 'just and proper.'"); *Bedrossian v. Northwestern Memorial Hosp.*, 409 F.3d 840, 843 n. 1 (7th Cir. 2005) (Uniformed Services Employment and Reemployment Rights Act; the "the court may use its full equity powers"); *Sharp v. Parents in Community Action, Inc.*, 172 F.3d 1034, 1038 (8th Cir. 1999) (labor injunction under NLRA; no dispute on the issue. "Thus, the Board properly concedes that the reference to "just and proper" in § 10(j) incorporates traditional equitable principles.").

Not one of the above decisions reference or demonstrate any conflict with other circuits, either generally or on the particular statutes involved.

Where statutes examined under *Romero-Barcelo* call for a "non-traditional" standard for an injunction, the courts of appeals – consistent with the test under that decision – depart from the traditional standard. *E.g., United States Postal Service v. Beamish*, 466 F.2d 804 (3d Cir. 1972) (postal service law; injunction to be entered where statute provided "the United States district court . . . shall . . . upon a showing of probable cause to believe . . . [that 39 U.S.C. § 3005] is being violated"); *Government of Virgin Islands, Dep't of Conservation and Cultural Affairs v. Virgin Islands Paving, Inc.*, 714 F.2d 283 (3d Cir. 1983) (the Virgin Islands Coastal Zone Management Act of 1978, provided for preliminary injunctive relief upon a "prima facie showing of a violation.").

Thus, four of the cases Chipotle critiques for not applying the four-factor test involve injunctions under the terms of the Railroad Revitalization and Regulatory Reform Act of 1976 which specifically authorizes injunctive relief to prevent violations of the act, with the chief case one which pre-dated *Romero-Barcelo*.[41] The other two cases authorized

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[41] *Atchison, T. & S. F. Ry. Co. v. Lennen*, 640 F.2d 255, 258 (10th Cir. 1981); *CSX Transp., Inc. v. Tennessee State Bd. of Equalization*, 964 F.2d 548, 550 (6th Cir. 1992); *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 869 (9th Cir. 1983) (Railroad Revitalization and Regulatory Reform Act of 1976 "specifically authorizes a district court to grant injunctive relief to prevent a violation of the statute."); *Burlington N. R.R. v. Department of Revenue*, 934 F.2d 1064, 1075 (9th Cir. 1991)

injunctions in civil rights cases where the statute, the Fair Housing Act, was found to "prohibit certain discriminatory practices without regard to their actual effect on the community" and to require an injunction.[42] There is no conflict among these cases; each is consistent with *Romero-Barcelo*.

This suit arises under Title III of the Americans with Disabilities Act. Chipotle cites no cases in which any court of appeals issued a decision in conflict with any other court of appeals (or district court) on whether the statute here falls on either side of the *Romero-Barcelo* test.[43]

The applicable principles are not black-and-white. Even the so-called "traditional standards" permit

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(challenge to appointment of special master; injunction issue mentioned in *dicta*)

[42] *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1423 (11th Cir. 1984) (in light of strong national policy against race discrimination in housing, where the Fair Housing Act prohibits certain practices without consideration of harm done by the practices, an unrebutted violation of the statute is sufficient to support an injunction remedying those violations.); *Silver Sage Partners, LTD v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001) (follows *Gresham*; holds "where a defendant has violated a civil rights statute, we will presume that the plaintiff has suffered irreparable injury from the fact of the defendant's violation.").

[43] The two ADA cases cited by Chipotle do not analyze, discuss or involve the question of standards for an injunction when a statute is violated. *See Bercovitch v. Baldwin School*, 133 F.3d 141, 151 (1st Cir. 1998) (no discussion of injunction standards; issue was a preliminary injunction to preserve the *status quo* re disruptive student pending arbitration); *Doe v. National Bd. of Med. Examiners*, 199 F.3d 146, 154 (3d Cir. 1999) (no discussion of injunction standards; issue was flagging of test scores of disabled student in graduate school testing reports).

injunctions without findings of irreparable harm and other elements which are balanced under those standards. *See*, for example, *United States v. Marine Shale Processors*, 81 F.3d 1329, 1358 (5th Cir. 1996) ("Weinberger and Amoco allow a court to issue an injunction without making findings of irreparable harm, inadequacy of legal remedy, or the balance of convenience, provided that traditional equitable principles permit such a course of action.").[44]

As *Marine Shale* indicates, the need to balance the elements of a four-factor test, by definition, will sometimes highlight the objectives and language of the relevant statute in determining the need, or the right to, an injunction. Indeed, in the case at bar, the court of appeals specifically referenced both the statute and the case-specific "circumstances" in making its determination.

D. Resolution of the Alleged Conflict in Chipotle's Favor Would Confuse the Courts Below and Upset Congressional Decision-making.

We have shown that there is no conflict among the circuits. If the Court adopted Chipotle's proposed rule that the four-part traditional test is always required for an injunction when a statute is violated, then *Romero-Barcelo* and its progeny would be overturned with unpredictable consequences.

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[44] Note that cases Chipotle cites acknowledge that some statutes do require injunctive relief under *Romero Barcelo*, without satisfaction of the traditional standards. *Bedrossian, supra; Natural Resources Defense Council v. Texaco Ref. & Marketing, supra.*

Courts would be compelled to re-examine and reverse the careful statute-specific analyses they have undertaken under the Railroad Revitalization and Regulatory Reform Act, the Fair Housing Act, the Coastal Zone Management Act of 1978, and multiple other statutes in which Congress has seen fit to mandate or authorize injunctions.

Congress presently is guided by *Romero-Barcelo*. Congress knows that when it includes permissive injunctive relief, the traditional four-part test will apply. When Congress chooses to mandate injunctive relief, the traditional test will not apply. Accepting Chipotle's stark "one test fits all" rule would hamstring Congress and needlessly limit the legislature's acknowledged authority to delineate remedies for statutory violations.

Chipotle's argument not only contradicts the *Romero-Barcelo* line of cases but also would dangerously emasculate numerous cases involving other statutes in the business world, on railroad transportation, in labor law, in the civil rights context, and other fields. Courts would be forbidden to undertake any consideration of a statute's objectives and text when requested to grant an injunction against continuance of a proven violation. The law does not favor such a straightjacket rule.

E. The Remand for an "Appropriate Injunction" Was Correct.

In a case which properly raised the question under *Romero-Barcelo*, the Court would consider the objectives and language of the architectural requirements of Title III of the ADA, and its

implementing rules, and the circumstances of the case, and determine whether Congress intended violations to be strictly enforced by an injunction, without application of the four-factor test.

Here, however, there is no need to reach the question, as we have shown above. Noting that Title III provides no damages but only injunctive relief to a private plaintiff, and considering the here uncontested violation of the ADA, the court of appeals relied on the fact stipulation establishing irreparable harm to Antoninetti, and on "all the circumstances," to find an abuse of discretion in the district court's denial of an injunction.[45]

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[45] If the issue was reached, Antoninetti submits, first, that he has satisfied the four-factor test in any event. If he has not, he submits that Title III's provisions, as applicable here, require an injunction to remedy a statutory violation. The ADA's implementing regulations state that new construction *shall* comply with the standards for accessible design published as the ADAAG. 28 C.F.R. 36.406(a). Congress clearly stated that the purpose of the ADA is to provide a *mandate* for the elimination of discrimination against people with disabilities. 42 U.S.C. §12101(b). The only exception in new construction is when an entity can demonstrate that it is structurally impracticable to meet the standards for design and construction, limited to those "rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features." 28 C.F.R. 36.401(c).

The enforcement provision for private suits brought under Title III of the ADA is codified at 42 U.S.C. § 12188. The regulation implementing the enforcement provision for private suits is found at 28 C.F.R. 36.501, discussed in the ADA Regulations' Section-by-Section Analysis, 28 C.F.R., App. B, pages 638-639, which confirms that Congress intended to mandate an injunction whenever a violation of the ADA new construction standards occurs:

IV. There Is No Conflict Between the Court of Appeals Decision and *Lujan v. Defenders of Wildlife.*

A. Congress Intended Private Enforcement of Title III to Redress Discrimination by Individuals Who Have Been Harmed by Its Violation or Who Have Been Deterred from Seeking Access.

About 53 million people in the United States are disabled.[46] Millions of Americans have mobility disabilities. For people 15 and older, 3.3 million use a wheelchair, 10.2 million use an ambulatory aid

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The Report of the Energy and Commerce Committee notes that "an order to make a facility readily accessible to and usable by individuals is *mandatory under* this standard. H.R. Rep. No. 485, 101st Cong., 2d Sess, pt. 4 at 64 (1990).

The House Report cited in the commentary states that, when new construction rules are violated, "the issuance of an order to make a facility readily accessible to and usable by individuals is *mandatory*," although the courts retain equitable discretion "in framing the terms of the *mandatory* injunction," such as the period for compliance. H.R. Rep. No. 485, 101st Cong., 2d Sess, pt. 4 at 64 (1990).

[46] McNeil, J. (2001). Americans with disabilities. Current Population Reports: Household studies, no. 1997, available at http://www.census.gov/prod/2001pubs/p70-73.pdf. Using different definitions, the U.S. Census Bureau put the number at 41.2 million in a 2009 publication. U.S. Census Bureau News, "Americans with Disabilities Act: July 26" CB09-FF.13 (May 26, 2009) (Facts for Features), available at http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb09-ff13.html.

such as a cane, crutches or walker.[47] These numbers are increasing.[48]

In adopting the ADA, Congress recognized that ". . . discrimination against individuals with disabilities continue to be a serious and pervasive social problem," and that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, ... failure to make modifications to existing facilities and practices, ... [and] segregation." 42 U.S.C. § 12101(a)(2), (5). One of the purposes of the ADA is to provide authority on a national scale to the disabled community, a disenfranchised segment of our society that is often excluded from everyday life because of myriad barriers, to litigate to enforce its rights.

The Americans with Disabilities Act is designed "to provide a clear and comprehensive national mandate for the elimination of discrimination

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[47] U.S. Census Bureau News, "Americans with Disabilities Act: July 26" CB09-FF.13 (May 26, 2009) (Facts for Features). 1990 data estimated the number of wheelchair users at 1.4 million. Chart at Section 2.2, in Kraus, L., Stoddard, S., & Gilmartin, D. (1996). *Chartbook on Disability in the United States, 1996.* An InfoUse Report. Washington, DC: U.S. National Institute on Disability and Rehabilitation Research. On wheelchair use, *see* Kaye, H.S., Kang, T., and LaPlante, M.P. 2000. Mobility Device Use in the United States. Disability Statistics Report 14. Washington, DC: U.S. Department of Education, National Institute on Disability and Rehabilitation Research.

[48] By 2050, there will be 88.5 million Americans over 65, more than doubling the 38.7 million in 2008. U.S. Census Bureau News, An Older and More Diverse Nation by Midcentury, Aug. 14, 2008, http://www.census.gov/ newsroom/releases/ archives/population/cb08-123.html.

against individuals with disabilities." *Tennessee v. Lane*, 541 U.S. 509, 516 (2004) (citation omitted); *Clackamas Gastroenterology Associates, P. C. v. Wells*, 538 U.S. 440, 446 (2003) ("[T]he statutory purpose of [the Americans with Disabilities Act of 1990 is] ridding the Nation of the evil of discrimination"). Title III's prohibition on discrimination in public accommodations includes requirements to "provide disabled individuals full and equal enjoyment" of the entity's services. *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 128-129 (2005).

When drafting Title III of the ADA, Congress recognized that the additional costs for making new facilities accessible were often nonexistent or negligible, and concluded that there was no reason why new buildings could not be barrier-free. Committee Reports, 101 H. Rpt. 485, Part 2 (May 15, 1990), reprinted 1990 U.S.C.C.A.N. 303, 317-318. Congress also found that the lack of strong, specific, enforceable legislation requiring accessibility was a major impediment to accomplishing barrier free environments. *Id.* at 318. Based on these findings, Congress recognized a need to establish a clear and comprehensive federal prohibition of discrimination on the basis of disability in new public accommodations. *Op. cit.*, 1990 U.S.C.C.A.N. at 310, 399-404.

Ultimately, Congress required a higher standard in new construction and alterations than in existing facilities because

> [t]he ADA is geared to the future — its goal being that, over time, access will be the rule, rather than the exception. Thus, the bill only

> requires modest expenditures to provide access in existing facilities, while requiring all new construction to be accessible.

Committee Reports, 101 H. Rpt. 485, Part 3 at 63 (May 15, 1990), reprinted 1990 U.S.C.C.A.N. 445, 486.

New construction and alterations must be "readily accessible to and usable by individuals with disabilities." 42 U.S.C. §12183(a). The standard means

> access to the goods, services, and programs of the facility. For example, a new building should be designed so that a potential patron can get to a store, get into the store, and get to the areas where goods are being provided.

H.R. Rep. 101-485, pt. 3, at 63 (1990). It stated further that, the New Construction Standard "is intended to enable people with disabilities (including mobility, sensory, and cognitive impairments) to get to, enter, and use a facility." H.R. Rep. 101-485, pt. 2, at 117-18 (1990).

Congress thus intended that all new facilities be designed and constructed to be accessible to the disabled, and that all responsible entities who failed to do so would be liable under the statute. 1990 U.S.C.C.A.N. at 310, 399-404; 42 U.S.C. §§ 12183(a), 12188(a)(2); see *Long v. Coast Resorts, supra*, 267 F.3d. at 923. The rule is strict and demands strict compliance.[49]

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[49] *See Small v. Dellis*, 1997 U.S. Dist. LEXIS 23611, 17-19 (D. Md. Dec. 18, 1997) ("the Accessibility Guidelines for new construction demand strict compliance," citing 28 C.F.R. §

B. Plaintiff Has Standing Under *Lujan*.

An Article III injury-in-fact is a harm that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). (internal quotations omitted). A plaintiff must show that he or she "sustained or is immediately in danger of sustaining some direct injury." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, (1983) (internal quotations omitted). For Article III standing, under *Lujan*, a plaintiff need not show "imminent" injury if he or she has suffered "actual" injury. Under *Lyons*, he or she need not show "immediate" danger of injury, if there is "sustained" injury.

Only in cases where an injury has not yet occurred must a plaintiff prove an injury is "imminent." In "imminent injury" cases, a generalized unrealistic intent to return to the place of injury "some day" is insufficient. *Lujan*, 504 U.S. at 564. In *Lujan*, for example, one individual, an American, had visited Egypt, not seen a crocodile, and had a "hope to observe the crocodile directly" some day. The other had once visited Sri Lanka, did not observe the endangered species in which she was interested, and hoped some day to be "more fortunate in spotting at least the endangered elephant and leopard." *Lujan*, 504 U.S. at 563. *Lujan* held that there was no Article III standing. As Justice Kennedy put it, concurring, "this is not a

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36.406(a)), *aff'd*, 2000 U.S.App. LEXIS 7739 (4th Cir., Apr. 25, 2000) (unpublished).

case where it is reasonable to assume that the affiants will be using the sites on a regular basis."

In contrast, where individuals are injured by an ongoing violation or when they are deterred from encountering the continuing illegal conduct, there is Article III standing. In *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181-183 (2000), the Court held that when one intends to return to and use the polluted area, and is deterred from doing so, one has standing under *Lujan*. Thus, under *Laidlaw*, the intent to return does not need to meet the "concrete and particularized" test set forth in *Lujan*.

Only by ignoring *Laidlaw* and similar cases can Chipotle argue that there is a conflict with *Lujan*. *See Hohlbein v. Hospitality Ventures LLC*, 248 Fed. Appx. 804, 805 (9th Cir. 2007) (deterrence from visiting hotel lacking sufficient wheelchair-accessible rooms is sufficient for standing under *Laidlaw*).

Antoninetti had visited the two restaurants before and after he sued, lives quite close to one of them, and had been awarded damages by the district court for ADA violations occurring during his visits. There is no dispute that Antoninetti was repeatedly denied the "Chipotle Experience," extensively promoted by the restaurants, in violation of the ADA. There is no dispute that he wanted to return.[50] For prospective relief under the ADA, he need not

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[50] It is undisputed that Antoninetti intended to return to the restaurants if they were made accessible. The parties stipulated to Antoninetti's intent to return. Chipotle never previously argued that the Stipulation does not evidence the parties' agreement that he intended to return; therefore, it has waived that argument and cannot raise it now.

engage in the "futile gesture" of visiting a building containing known barriers that the owner has no intention of remedying, see 42 U.S.C. § 12188(a)(1). It is sufficient for standing that Antoninetti was excluded and intended to return "tomorrow" but for the deterrence of continued ADA violations. He needs only to "at least prove knowledge of the barriers and that they would visit the building in the imminent future but for those barriers." *Steger v. Franco, Inc.* 228 F.3d 889, 892 (8th Cir. 2000). (citation to *Laidlaw* omitted).

A wheelchair user who has been discriminated against by a fast food restaurant need not have a greater intention to return than Antoninetti here. Three cases are cited by Chipotle (Pet. at 29); none provide substantive support to its position; two of the cases actually support Antoninetti's standing.[51]

If Chipotle's view of standing were to be upheld, a person who enjoys a meal at McDonald's, Burger King, Arby's, Chipotle, or even a white tablecloth restaurant, could never litigate a Title III case

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[51] *Access for America, Inc. v. Associated Out-Door Clubs, Inc.*, 188 F.Appx. 818 (11th Cir. 2006) is an unpublished three-paragraph opinion, without discussion, simply upholding a district court's fact finding on "intent to return." In *Tandy v. City of Wichita*, 380 F.3d 1277, 1284-1285 (10th Cir. 2004), a Title II ADA tester's intent to use city buses "several times a year" was found to be "sufficiently impending to support standing to seek prospective relief." Similarly, the Eighth Circuit found that a blind plaintiff had standing to sue an office/retail building when – on his only visit -- he simply attempted to use a first floor restroom (he had been in the building's storefront coffee shop), but was unable to locate it. "He has not reentered the building since then." *Steger v. Franco, Inc.* 228 F.3d 889, 891-892 (8th Cir. 2000).

unless his or her next visit was penciled in on a calendar. That view is unreasonable.

C. The *Lujan* Issue Is Not Important.

Chipotle suggests that this case be heard because "across the country" plaintiffs are "using the threat of costly redesign injunctions to extract cash settlements" in frivolous cases of "ADA lawsuit abuse." Pet. at 30-31. This case does not involve any such situation.

In this case, Chipotle agreed at the outset that the removal of the wall was not a cost issue. This case was not abusive; both the court of appeals and the district court found that Chipotle violated the ADA and awarded damages.

Contrary to Chipotle's reading, the court of appeals did not "prohibit[ ] courts from considering serial-litigant status." Pet. at 30. Rather, the lower court agreed that courts "must therefore be 'particularly cautious' regarding 'credibility determinations that rely on a plaintiff's past [Disabilities Act] litigation." Pet. 2a. In any event, serial litigation is an accepted mechanism for securing one's civil rights.[52]

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[52] *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982) (Fair Housing Act testers); *Kyles v. J.K. Guardian Sec. Servs.*, 222 F.3d 289, 299 (7th Cir. 2000) (discussing public interest advanced by testers; "The fact that testers have no interest in a job does not diminish the deterrent role they play by filing suit under Title VII."); *Tandy v. City of Wichita*, 380 F.3d 1277, 1284-1285 (10th Cir. 2004) (ADA Title II suit based on testers' experience with Wichita Transit's bus system); *Shaver v. Indep. Stave Co.*, 350 F.3d 716, 723-724 (8th Cir. 2003) (Civil rights tester litigation is protected. "Nothing in the words of the statute or in our cases, however, suggests that the

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 2011

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conduct of the aggrieved party, other than the party's initial protected activity, is relevant. Rather, the law focuses exclusively on the conduct of the alleged retaliator in determining whether the aggrieved plaintiff has a claim."). *Cf. Armstrong v. Turner Indus.*, 141 F.3d 554, 563-564 (5th Cir. 1998) (no standing where plaintiff job applicant in employment discrimination case has no "plans to seek employment with Turner again" and "does not assert any likelihood that he will be subjected to a similar violation in the future.").

APPENDIX

District Court Order of November 29, 2010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MAURIZIO ANTONINETTI,
Plaintiff,

v. Case No. 05cv01660-J-WMC

CHIPOTLE MEXICAN GRILL,
Defendant.

ORDER RE NINTH CIRCUIT MANDATE AND OPINION

On November 16, 2010, a hearing took place before the Court regarding the Ninth Circuit's Mandate and Opinion in the above-captioned case. Pursuant to that Opinion, **the Court hereby orders the Clerk to enter judgment** against Defendant Chipotle for violation of the Americans with Disabilities Act.

On remand, three issues are now before the Court: (1) the scope of injunctive relief for this violation; (2) the amount of damages due to Plaintiff under the California Disabilities Act; and (3) the amount of attorney's fees due to Plaintiff's counsel under the Americans with Disabilities Act. Each issue will be addressed in turn.

I. Injunctive Relief

The Ninth Circuit held that Plaintiff's inability to view food preparation counters (counters containing the different foods that are available to Chipotle customers and on which the customers' individual orders are prepared) violated the Americans with Disabilities Act and remanded to the Court to determine the scope of injunctive relief necessary to remedy this violation. *Antoninetti v. Chipotle*, 08-55867, slip op. at 16017. At the November 16, 2010 hearing, Chipotle's counsel represented that Chipotle has lowered food preparation counters to a height where wheelchair-bound customers can view the counter without obstruction. This modification has been made at all Chipotle restaurants in California, including the two restaurants at issue in this case. Defendant argues that these actions render moot the need to issue an injunction.

Although Plaintiff does not dispute that lowering food preparation counters to a height suitable for wheelchair-bound customers would remedy the Disabilities Act violation at issue in this case, Plaintiff raises two concerns. First, Plaintiff has not yet received any evidence documenting these modifications. Second, Plaintiff argues that an injunction is still necessary to ensure that these modifications are made permanent.

The Court agrees that an order on this issue would be premature at this time. The Court requires a documentary record of modifications made to bring

the food preparation counter into compliance with the Americans with Disabilities Act. Moreover, for the Court to properly follow the Ninth Circuit opinion, an appropriate measure must be in place to ensure that Chipotle's food preparation counters remain permanently in compliance with this law. Because an injunction is not necessarily the only means to accomplish this goal, limited discovery and briefing on this issue are appropriate. Accordingly, the parties are to proceed as follows:

1. Defendant is to produce all evidence showing mootness by January 7, 2011;

2. The parties then have ninety days from service of Defendant's evidence of mootness to conduct discovery on this issue;

3. Plaintiff is to file a motion for summary judgment by April 22, 2011;

4. Defendant's response is due by May 6, 2011;

5. Plaintiff's reply is due by May 13, 2011.

All disputes regarding discovery on this issue or this briefing schedule are to be addressed to this Court.

II. Damages

At the hearing, Plaintiff's counsel represented

that Plaintiff is seeking $3,000 in additional damages under the California Disabilities Act for litigation related visits and that Plaintiff is not seeking additional damages for violations related to parking.

The Court hereby refers this issue to the Magistrate Judge for a settlement conference. If the parties cannot reach settlement on this issue, a litigation schedule will be entered by the Magistrate Judge. The Parties and their counsel shall appear before Magistrate Judge McCurine on January 12, 2011 at 2pm for a settlement conference. Judge McCurine may make any orders related this conference he deems appropriate.

III. Attorney's Fees

Plaintiff's counsel is entitled to attorney's fees greater than the $136,357.83 awarded for work performed in the original district court action. *See* slip op. at 16019. Because additional attorneys fees beyond this increased amount may be appropriate for work done after the Ninth Circuit issued its mandate, the Court, in the interest of judicial economy, will address attorney's fees after the other issues on remand are resolved.

IT IS SO ORDERED.

DATED: November 29, 2010

/s/
Honorable Barry Ted Moskowitz
United States District Judge

(3)

No. 10-1051

Supreme Court, U.S.
FILED
MAR 2 3 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CHIPOTLE MEXICAN GRILL, INC.,
Petitioner,

v.

MAURIZIO ANTONINETTI,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner Chipotle Mexican Grill, Inc., states that the corporate disclosure statement included in the petition remains accurate.

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IN THE

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NO. 10-1051

CHIPOTLE MEXICAN GRILL, INC.,
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v.

MAURIZIO ANTONINETTI,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY FOR PETITIONER

In case after case, the courts of appeals have disagreed over whether the fact that a statute *authorizes* injunctive relief reduces or eliminates a plaintiff's burden of showing that the traditional equitable criteria favor an injunction. In the decision below, the Ninth Circuit cemented its position in that debate, holding that the district court *must* enter an injunction in this case—despite the district court's findings that respondent had neither a sincere nor a concrete desire to return to Chipotle's restaurants—because Title III's authorization of injunctive relief at least *reduces* a plaintiff's equitable burden.

Respondent does not dispute the importance of the conflict—either to the ADA or to the wide array of other statutes it implicates. See Pet. 22-24. Nor does he make any serious effort to defend the rule the Ninth Circuit

actually applied. Instead, he invokes the Ninth Circuit's statement that it was not deciding whether Title III *eliminates* a plaintiff's equitable burden entirely. But that disclaimer is irrelevant. The Ninth Circuit clearly held that Title III's authorization of injunctive relief at least *reduces* a plaintiff's burden. That holding alone confirms the conflict between the Ninth Circuit (among others) and the many circuits holding that mere authorization of injunctive relief does not alter a plaintiff's burden unless Congress takes the further step of *mandating* injunctive relief.

Respondent's efforts to avoid review on the second question likewise fail. The Ninth Circuit held that respondent had shown irreparable harm based solely on a stipulation that he "wants *to be able to have* the 'Chipotle experience.'" Pet. App. 15a (emphasis added). That ruling conflicts with this Court's holding in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), that vague "some day" intentions to return are not sufficient. Respondent's waiver argument and invocation of his self-serving testimony that he would return "tomorrow" had he not been deterred are both unavailing. The waiver argument is meritless. And the district court specifically found the cited testimony *not credible*—which is why the Ninth Circuit nowhere relied on it. The Ninth Circuit's departure from *Lujan* was thus dispositive. It independently warrants review.

I. The Circuits Are Divided Over Whether A Statute's Express Authorization Of Injunctive Relief Reduces Or Eliminates A Plaintiff's Burden

The Second, Third, Fourth, Fifth, Seventh, and Eighth Circuits have all held that a statutory provision authorizing (but not mandating) injunctive relief does not

reduce or eliminate a plaintiff's burden to show that the equitable factors favor an injunction. Pet. 16-17. But the Sixth, Ninth, Tenth, and Eleventh Circuits follow the opposite rule—that "'[t]he standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief.'" Pet. 18-20.

A. Notwithstanding that clear conflict, respondent insists that all the cases are reconcilable because courts "uniformly apply *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982)" to decide "whether the four-factor criteria apply, or whether the statute requires a mandatory injunction." Br. in Opp. 4, 20-24. Not so.

Some circuits follow the rule that the traditional standards govern unless Congress has affirmatively *mandated* injunctive relief. See Pet. 16-17; Br. in Opp. 21-22. That approach is consistent with *Romero-Barcelo*'s directive that courts must examine whether a particular statute "'in so many words, or by a necessary and inescapable inference, *restricts* the court's jurisdiction in equity'" by *mandating* an injunction. 456 U.S. at 313 (emphasis added). That is the standard Chipotle advocates here. Pet. 24-25.[1]

Other circuits, however, follow a different rule—that a statute's mere *authorization* of injunctive relief justifies departure from traditional standards. In *Atchison, Topeka & Santa Fe Railway Co.* v. *Lennen*, 640 F.2d 255 (10th Cir. 1981), for example, the Tenth Circuit held that "'[w]here an injunction is *authorized* by statute it is un-

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[1] Respondent accuses Chipotle (at 24) of seeking to "overturn[ ]" *Romero-Barcelo* in favor of a rule that "the four-part traditional test is always required" even where a statute mandates injunctive relief. The petition nowhere argues for such a rule. To the contrary, it expressly relies on the *Romero-Barcelo* framework. Pet. 24-25.

necessary for plaintiff to plead and prove the existence of the usual equitable grounds.'" *Id.* at 260 (emphasis added). Respondent claims (at 22-23) that *Lennen* is "consistent with *Romero-Barcelo*," but plainly it is not: Mere *authorization* of injunctive relief does not prove Congress intended to *mandate* such relief.

Lennen is not alone. The Sixth, Ninth, and Eleventh Circuits have all similarly held that mere statutory authorization of injunctive relief reduces or eliminates a plaintiff's traditional burden. See Pet. 19-22 (citing *CSX Transp., Inc.* v. *Tenn. State Bd. of Equalization*, 964 F.2d 548, 550-551 (6th Cir. 1992); *Gresham* v. *Windrush Partners, Ltd.*, 730 F.2d 1417, 1423-1424 (11th Cir. 1984); *Trailer Train Co.* v. *State Bd. of Equalization*, 697 F.2d 860, 869 (9th Cir. 1983); *Burlington N. R.R. Co.* v. *Dep't of Revenue*, 934 F.2d 1064, 1074-1075 (9th Cir. 1991); and *Silver Sage Partners, Ltd.* v. *City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001)). Those decisions likewise cannot be dismissed as "consistent with *Romero-Barcelo*." Br. in Opp. 22-23. Not one cites *Romero-Barcelo* or makes any effort to determine whether the statutory text *mandates* an injunction "'in so many words, or by a necessary and inescapable inference.'" 456 U.S. at 313. Instead, they all rely on *Lennen* and its progeny to hold that a statute's mere *authorization* of injunctive relief displaces traditional standards.[2]

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[2] Respondent cites *United States* v. *Marine Shale Processors*, 81 F.3d 1329 (5th Cir. 1996), for the proposition that "[e]ven the so-called 'traditional standards' permit injunctions without findings of irreparable harm and other elements." Br. in Opp. 23-24. But *Marine Shale* was addressing specific situations, such as suits by sovereigns, where the usual standards traditionally do not apply. Respondent points to no traditional exception applicable here.

Respondent's claim (at 17) that the conflict "pre-dates the modern enunciation of the test" in *Romero-Barcelo* similarly fails. Aside from *Lennen* itself, every one of the foregoing cases post-dates *Romero-Barcelo*. Respondent's complaint (at 16-17) about the petition's purported "disfigur[ation]" of *United States* v. *Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998), thus proves nothing. While the D.C. Circuit singled out the Tenth Circuit's pre-*Romero-Barcelo* decision in *Lennen* in identifying the conflict, the Sixth, Ninth, and Eleventh Circuits have all continued to follow *Lennen* even after *Romero-Barcelo*, as the cases cited above (at 4) and in the petition (at 19-22) make clear. The cases on the other side of the conflict post-date *Romero-Barcelo* too. Pet. 16-17. The D.C. Circuit's observation that a conflict exists (the only point for which the case was cited) thus is no less true today.

The circuits are also divided in the specific context of the ADA. Pet. 18. Respondent asserts that the cited cases "do not analyze, discuss or involve the question of standards for an injunction." Br. in Opp. 23 n.43. To the contrary, both specifically address the applicable standard and conclude that the traditional equitable standard applies. See *Bercovitch* v. *Baldwin Sch., Inc.*, 133 F.3d 141, 151-156 (1st Cir. 1998); *Doe* v. *Nat'l Bd. of Med. Examiners*, 199 F.3d 146, 154-158 (3d Cir. 1999). Those cases cannot be reconciled with the Ninth Circuit's departure from that traditional standard here.

B. Respondent asserts that this case does not properly present the conflict because the Ninth Circuit "emphatically and explicitly did not decide" the issue. Br. in Opp. 3-4, 12-13. But the only question the Ninth Circuit purported not to decide was whether a statute's authorization of injunctive relief *eliminates* a plaintiff's equitable burden entirely—in other words, whether Title III

ever "authorizes a district court to deny injunctive relief after finding a violation of the Act." Pet. App. 15a. The Ninth Circuit clearly held that authorization at least *reduces* a plaintiff's burden; respondent does not contend otherwise. The Ninth Circuit relied on "the fact that an injunction is the only relief available to a private party under the Act" as a factor weighing heavily—here, dispositively—in favor of an injunction. *Ibid.* And it quoted its earlier holdings that "'[t]he standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief.'" *Id.* at 16a. That holding alone—that mere authorization of injunctive relief *reduces* the plaintiff's burden—puts the Ninth Circuit in conflict with the many circuits holding that traditional standards govern unless Congress *mandates* injunctive relief.

In any event, the Ninth Circuit's disclaimer was a fig leaf. In ordering an injunction, the *only* factors the court relied on were its finding that the ADA had been violated, the statute's provision for injunctive relief, and the existence of other "circumstances" that the court, tellingly, never identified. Pet. App. 15a. The Ninth Circuit never addressed two of the equitable factors the district court relied on: the public interest and the balance of hardships. *Id.* at 90a.[3] And the court of appeals' irreparable-harm analysis—added belatedly on rehearing—rests on a stipulation so devoid of content that it could not possibly *compel* an exercise of the district court's discretion under traditional standards.

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[3] Respondent asserts that Chipotle "waived" any cost defense. Br. in Opp. 11 & n.29. But the district court did not see things that way; it expressly considered the issue. See Pet. App. 90a.

C. Respondent also errs in claiming that review would be premature or advisory because an injunction might not be necessary after all. Br. in Opp. 14-15. The Ninth Circuit expressly held that "it would be an abuse of discretion for the district court now to deny injunctive relief." Pet. App. 15a. And the district court declared on remand that, changed circumstances notwithstanding, "for the Court to properly follow the Ninth Circuit opinion, an appropriate measure must be in place to ensure that Chipotle's food preparation counters remain permanently in compliance with this law"—*rejecting* Chipotle's argument that its voluntary compliance mooted the case. Br. in Opp. App. 2a-3a. Although the district court did suggest at one point that some other "measure" short of an injunction might suffice, *id.* at 3a; but cf. Pet. App. 13a (injunction the "sole remedy" under Title III), the very fact that coercive relief remains a live issue before the district court means that the propriety of the Ninth Circuit's decision ordering such relief is properly before this Court.

Nor does it matter that the precise contours of any remedy have yet to be defined. Chipotle's position throughout has been that respondent is not entitled to an injunction *at all* because he cannot meet the traditional criteria; the Ninth Circuit held otherwise based on its conclusion that Title III's authorization of injunctive relief reduces the plaintiff's burden. Nothing about the contours of the ultimate remedy sheds any light on those legal issues. "[T]he interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." Gressman *et al.*, *Supreme Court Practice* 282 (9th ed. 2007).

That is precisely the case here. If this Court rules that the Ninth Circuit erred because traditional standards govern, further proceedings on the *contours* of an injunction will likely prove unnecessary.

D. On the merits, respondent does not defend the *Lennen* standard the Ninth Circuit actually applied. Instead, he argues in a footnote (at 26-27 n.45) that Title III injunctions are mandatory even under *Romero-Barcelo*. But those merits arguments only underscore the need for review.

Respondent first urges that the ADA states that "new construction *shall* comply" with its standards and thus "provide[s] a *mandate* for the elimination of discrimination." Br. in Opp. 26 n.45. But the question is whether an *injunction* is mandatory, not whether the *law* is mandatory. Virtually all laws are mandatory. Respondent thus urges *Romero-Barcelo*'s evisceration, not its application.

Respondent's invocation (at 26-27 n.45) of one paragraph of legislative history, and an administrative guide citing it, is equally unavailing. That report notes that, under 42 U.S.C. §12188(a)(2), injunctions must include facilities-modification orders. It does not state that injunctions are mandatory in all cases. See H.R. Rep. No. 101-485(IV), at 63-64 (1990). And one paragraph of legislative history cannot establish the "'clear and valid legislative command'" necessary to justify abandoning traditional equitable standards. *Romero-Barcelo*, 456 U.S. at 313; see *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992).

II. The Ninth Circuit's Departure From *Lujan* Also Warrants Review

The Ninth Circuit's decision also defies *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992). The Ninth Cir-

cuit held that respondent had shown irreparable harm based solely on a stipulation that he "wants *to be able to have* the 'Chipotle experience.'" Pet. App. 15a (emphasis added). That decision conflicts with *Lujan*'s holding that mere "'some day' intentions" to return to a place, "without any description of concrete plans," are not enough. 504 U.S. at 564.

A. Respondent urges (at 13-14) that this issue was "not properly raised" below because his standing was challenged for the first time on rehearing. But the Ninth Circuit added the disputed language to its opinion *in response to* the rehearing petition. See Pet. App. 2a, 15a. It cannot be that holdings adopted by an appellate court *after* rehearing are unreviewable. The settled rule is that, so long as the court of appeals actually passes on an issue, the time when the petitioner first raised it is irrelevant. See *Va. Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Stevens* v. *Dep't of Treasury*, 500 U.S. 1, 8 (1991).

Respondent's further contention (at 13) that the court below did not "decide the *Lujan* question" lacks merit. The challenged language was added in response to Chipotle's *Lujan*-based rehearing petition. And while the court analyzed the issue in terms of irreparable harm rather than standing, the rubric is immaterial. As already explained, Pet. 28 n.6, if a plaintiff cannot even show Article III standing to seek an injunction, *a fortiori* he cannot show the irreparable harm necessary under the traditional equitable standard.

B. Respondent offers practically no defense of the Ninth Circuit's holdings. He barely mentions the holding that courts may not attach any meaningful weight to a plaintiff's serial-litigant status in evaluating the sincerity of a professed desire to return. Respondent insists that

"serial litigation is an accepted mechanism for securing one's civil rights." Br. in Opp. 34. But he never explains why courts should be prohibited (or even discouraged) from relying on that status when making credibility determinations to which it is plainly relevant—particularly where a plaintiff has sued dozens or hundreds of businesses in the past and could not possibly plan to return to them all. The very fact that serial litigation is an "accepted" (*i.e.*, widespread) tactic underscores the need for this Court's guidance.

Respondent's attempted defense of the Ninth Circuit's reliance on his stipulation—that he "wants to be able to have the 'Chipotle experience,'" Pet. App. 15a—fares even worse. Respondent's assertion (at 31) that "a plaintiff need not show 'imminent' injury if he or she has suffered 'actual' injury" is flatly contrary to *Lujan*. "'"Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief * * * if unaccompanied by any continuing, present adverse effects."'" *Lujan*, 504 U.S. at 564 (quoting *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983)). Past harm may suffice for damages. But absent some threat of future injury, there is nothing for an injunction to remedy.

Respondent also claims that *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), supersedes *Lujan*'s "concrete plans" requirement where a plaintiff claims he is "deterred" from going to a location. Br. in Opp. 32. But that is not what *Laidlaw* held. And the Ninth Circuit's rationale had nothing to do with deterrence. The court held that respondent could seek an injunction because, per the stipulation, he "wants to be able to have the 'Chipotle experience.'" Pet. App. 15a. That is, at best, precisely the sort of "some day" intention that *Lujan* addressed and found wanting.

Indeed, it is not even that, because it is simply an abstract desire to have *the ability* to do something at some unspecified future date.[4]

Respondent similarly errs in invoking his testimony that he would return to the restaurants "tomorrow" if he were not deterred. Br. in Opp. 10, 32-33. The district court found that testimony *not credible* and respondent's professed intent to return *insincere*. Pet. App. 87a. The Ninth Circuit never relied on respondent's discredited testimony, instead resting its holding solely on the stipulation. *Id.* at 15a. Respondent cannot avoid review based on testimony the Ninth Circuit never invoked and the district court found insincere. While respondent alleges (at 6 n.5) a variety of other "misstatements" in the petition, they too rest on refusals to accept the district court's findings and the Ninth Circuit's actual rationale.[5]

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

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[4] Respondent's assertion (at 32 & n.50) that "[t]here is no dispute that he wanted to return" is false. Chipotle has contended throughout that the "evidence presented at trial supported the District Court's finding that Antoninetti's purported desire to return to the Restaurants was insincere." C.A. Br. 71.

[5] Respondent quibbles (at 9 n.22) with the statement that he "indicated he was 'satisfied with the service he had received,'" Pet. 8, pointing out that it rests on an employee's testimony about what he had indicated. But the district court credited that testimony and adopted it as a finding of fact. Pet. App. 75a-77a. Likewise, respondent's reference (at 10) to "numerous complaints from customers in wheelchairs" (six nationwide over four years, C.A. E.R. II-15 at 59-64) does not undermine the district court's finding that no such complaints were ever made about *these* restaurants. Pet. App. 90a.

Respectfully submitted.

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MARCH 2011